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This volume on law and collective negotiations in the schools is the second in a series of 4 monographs comprising a broad investigation of teacher collective action in local school districts in the United States. Part I (30 pages) of this volume deals with emerging local doctrine relating to the rights of teachers and other public employees to organize, negotiate, engage in concerted activities, etc. It emphasizes problem areas within the law relating to school bargaining which are as yet not resolved. Part II (37 pages), compiled by Arthur B. Smith, is a review of the statutory law relevant to teacher negotiations in the context of a comprehensive survey of all legislation concerning bargaining by government employees. Subsections include Creation of Collective Bargaining Rights, Designation of Employee Representatives, Regulations of the Negotiation Process, Unfair Labor Practices, The No-Strike Policy and Its Enforcement, Impasse Procedures, and Administrative Machinery. (JS)

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COLLECTIVE ACTION BY PUBLIC SCHOOL TEACHERS

Vol. II: The Law and Collective NEgotiations in Education

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Volume II

The Law and Collective Negotiations in Education

University of Chicago
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May, 1968

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PREFACE

This volume on the law and collective negotiations in the schools is the second in a series of four monographs comprising a comprehensive investigation of teacher collective action in local school districts in the United States conducted at the Industrial Relations Center, The University of Chicago. Volume I of the series contains a history of teacher organization welfare efforts and the results of a nationwide survey of local district teacher collective activity. Volume III is a detailed analysis of bargaining impasses in a sample of school districts which experienced difficulty in reaching agreement during negotiations. Finally, Volume IV presents the results of investigations of the impact of negotiating activity between school boards and teacher organizations in twenty selected districts across the country.

The content and organization of the present volume are explained in the Introduction. However, special mention must be made here of the fact that the extensive compilation and analysis of state statutes relating to organizing and bargaining in the public service which comprises Part II of this volume is the work of Arthur B. Smith, presently a student at the University of Chicago Law School.

Wesley A. Wildman

INTRODUCTION

The emergence of collective negotiations in education is part and parcel of the struggle for recognition and the right to organize and bargain among public employees generally. The rapidly changing law relating to teachers and other public employees' rights to organize and negotiate has played a critical role in the shaping and development of school district and other public sector bargaining in recent years.

As pressure increases to formalize interaction between boards of education and teacher groups, the parties to these new relationships have supported and/or had imposed on them a bewildering variety of statutory provisions and legal concepts embodied in case law, attorney general opinions, etc., from state to state. The rapidly developing law applicable to the various phases of collective negotiations in the schools has played, in the last decade, both a vital cause and effect role with respect to the emerging school negotiations phenomenon. The adoption of statutes and modifications in legal doctrine as expressed through court decisions has oftimes been a response to the accomplished fact of teacher and other public employee pressure for organizing and bargaining rights; in other instances, legislation has had a crucial "top-down" effect in being responsible for the adoption of formal negotiation relationships (based on the legislatively established rules) in some school districts which, but for the passage of an applicable law, would undoubtedly have maintained (and, contentedly, in many cases) the established and familiar patterns of teacher-administration-school board interaction.

Much of both a descriptive and analytic nature has been written to date on the emerging law applicable to collective negotiations in the schools and we will not repeat in exhaustive detail here adequate work already done.

For background on the law and bargaining in public employment generally, the excellent short volume by Hanslowe should be perused.* For a general overview of the law applicable to negotiations in education the reader can consult relevant chapters in the larger works published to date on collective negotiations in education.** For a comprehensive, engaging, and sophisticated discussion of what "model" or "ideal" legislation covering negotiations between teachers and boards might contain (along with an analysis of existing statutes) the volume on teacher bargaining by Oberer and Doherty is highly recommended.*** Also, comprehensive cataloguings of applicable AGO's, court cases and statutes for all of the fifty states are available.****

The coverage in this volume of the law relating to teacher and other public employee bargaining is divided into two parts:

Part I deals with emerging legal doctrine relating to the rights of teachers and other public employees to organize, negotiate, engage in concerted activities, etc. It emphasizes problem areas within the law relating to school bargaining which are as yet far from resolved.

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*Kurt L. Hanslowe, The Emerging Law of Labor Relations in Public Employment, ILR Paperback #4, Cornell University (Ithaca, New York: Cayuga Press [October 1967]).

**T. M. Stinnett, Jack H. Kleinmann, and Martha L. Ware, Professional Negotiation in Public Education (New York: The MacMillan Company, 1966); Myron Lieberman and Michael H. Moskow, Collective Negotiations for Teachers: An Approach to School Administration (Chicago: Rand McNally & Co., 1966).

***Robert E. Doherty and Walter E. Oberer, Teachers, School Boards, and Collective Bargaining: A Changing of the Guard, ILR Paperback #2, Cornell University (Ithaca, New York: Cayuga Press [May 1967]).

****National Education Association, Professional Negotiation with School Boards: A Legal Analysis and Review (Washington, D.C.: NEA Research Division, 1965); 1967 Executive Committee of the National Governors' Conference, Report of Task Force on State and Local Government Labor Relations (Chicago: Public Personnel Association, 1967).

Part II covers the legislative (statutory) response to the public employee negotiations phenomenon. We have chosen in Part II to review the statutory law relevant to teacher negotiations in the context of a comprehensive survey of all legislation concerning bargaining by government employees. No two states have taken precisely the same statutory approach to structuring negotiations relationships between public employee organizations and public employers. Understanding of the various statutory provisions applicable to teacher bargaining is facilitated and appreciation of possible alternatives enhanced when one examines the entire fascinating variety of statutory strategems which have been fashioned to deal with employer-employee relations in the public service.

COLLECTIVE ACTION BY PUBLIC SCHOOL TEACHERS

VOLUME II

The Law and Collective Negotiations in Education

PART I

EMERGING LEGAL DOCTRINE

PART I: EMERGING LEGAL DOCTRINE

We shall first examine the assumptions underlying collective relationships in private industry and the key aspects of policy and practice supporting and implementing these relationships. This will provide a basis for comparison that will aid comprehension as to where the law now stands across the country in regard to teacher negotiating activities.

Collective bargaining in industry is essentially a power relationship and a process of power accommodation. The avowed theoretical purpose and practical effect of bargaining in industry in the United States has been to grant employee organizations an increased measure of control over the decision-making processes of management. The essence of bargaining is compromise and concession-making on matters over which there is conflict between the parties to the relationship. The bargaining relationship is a bona fide one if each party retains the right and ability to inflict loss on the other in the event of failure to reach an agreement as to how they shall live together for a specified period. While much problem-solving may take place in negotiations—particularly at the beginning of a bargaining relationship—true, mature collective bargaining in either industry or school systems is much more than an elaborate structure of communications or a new type of formal procedure designed simply to resolve problems to the mutual satisfaction of all parties concerned.

The theory and practice of collective bargaining are based on two assumptions: first, that there is a significant and continuing conflict between the managers and the managed in any enterprise, and second, that there will be a strong, identifiable community of interest and consensus within the employee group in regard to items and areas of judgment over which there will be conflict with the managing authority. The establishment of a formal collective employer-employee relationship can set in motion certain processes that tend to change these underlying assumptions into self-confirming hypotheses.

Making available to an employee organization a significant number of the key elements of collective bargaining supports and encourages the bargaining relationship, and results in the institutionalization of the conflict that is presumed to exist. These key elements of private sector bargaining—either provided for or supported by law—are as follows:

The right to organize. —Employees are permitted to organize without influence or coercion from either management or labor. Machinery is provided in our federal legislation and in some of our state labor relations statutes for impartial adjudication by the National Labor Relations Board or a state labor board of charges that the employees' right to organize is being interfered with either by management or by a labor union.

Designation of an exclusive, majority representative. —Under law in the private sector, the NLRB is empowered to hold an election to determine a majority representative (if any) within an "appropriate" bargaining unit. Usually (but not always) such elections are held as a result of the filing of a "timely" petition by the union which wishes to represent the employees of a given plant or office. The NLRB has the authority to determine, before the election, what classes and groups of employees shall be included in a given bargaining unit and allowed to vote. The proper composition of a bargaining unit often presents many problems in industry, but almost invariably all levels of supervision are excluded from the rank-and-file unit. Exclusive representation, granted to the majority representative, allows (and compels) the majority representative organization to represent all employees in the bargaining unit—regardless of whether they voted for the union or whether they join the union. Also—and this is important—the principle of exclusive representation means that the employer cannot deal or strike bargains with individuals or other organizations on any matter over which the employer has an obligation to bargain with the majority representative. The alternative to exclusive representation is considered, in the private sector, to be an impracticable arrangement which forces management to face competing organizations, any of which might have different requests and demands for small groups of the total number of employees who must, in the last analysis, be governed by a relatively uniform set of rules and policies relating to wages, hours and other conditions of employment.

Union shop or other "union security" arrangements. —The typical "union shop" clause in a collective contract between the union and the employer states that all employees must join the union within 30 days (or more) after being hired or lose their jobs. Federal laws permit such a requirement although the states have the option to adopt "right to work" laws which forbid such an agreement between an employer and a union. At present, nineteen states have "right to work" laws which make most "union security" provisions illegal.

Dues checkoff. —This contractual provision allows union dues to be deducted from employees' paychecks and sent directly to the union. The union shop and the checkoff clauses are important to the union as an ongoing institution, since they can determine whether or not the organization will have a sufficient membership and financial base to operate adequately.

Bargaining and signing an enforceable agreement. —In the private sector the duly authorized union has the right to insist that the employer meet and bargain concerning wages, hours, and other conditions of employment. Under federal law, management and the union are required to negotiate "in good faith" but they are not required to reach an agreement. If agreement is reached, however, either party may insist that such agreement be incorporated into a written (legally binding) document. The behavioral requirements of "good faith" bargaining in the private sector have become quite complex; moreover, the definition of bargainable subject matter which appears in the federal legislation (wages, hours, and other terms and conditions of employment), has been expanded constantly by the NLRB and the courts since passage of the Wagner Act, to make an ever greater number of items subject to "good faith" bargaining.

Here again, in bargaining relationships covered by federal laws and under some state statutes, charges that either party is refusing to negotiate in "good faith" may be pressed and tried before an impartial adjudicatory body.

Grievance processing, terminating in binding arbitration.—This is the crucial procedure that constitutes the heart of a majority of labor contracts in industry. It provides for the peaceful settlement of disputes that arise over the application or interpretation of a contract during its term. When a dispute cannot be settled by the parties themselves through the grievance procedure, it may be submitted under a typical arbitration clause to a neutral third party for final determination. If the parties have reached an impasse in negotiations, binding arbitration may also be used to determine some or all of the basic terms and conditions of the collective contract itself, but this practice is relatively rare in the United States.

When there is an agreement in the collective contract to submit all unresolved disputes to binding arbitration during the life of the contract, there is also frequently a clause that denies the union the right to strike while the contract is in force.

"Concerted activities:" picketing and the strike.—These are the union's ultimate power prerogatives which may be exercised in an attempt to force an agreement in the event of a bargaining impasse with the employer. The employer, of course, has the right to refuse to employ labor on the terms and conditions demanded by the union and has, under many circumstances, the right to "lock out" employees in the event of a bargaining impasse.

A union's right to strike, boycott and picket in the private sector is limited and controlled by our federal labor legislation. For instance, the law requires the giving of notice before strike action is undertaken; "secondary boycotts" and the right to picket for recognition purposes are severely limited by law; and strikes which constitute national emergencies may be enjoined by the government, at least temporarily.

Many of these elements of private sector bargaining (with the exception of the right to strike) are being extended to teachers (or other public employees) by state legislation and court decisions, municipal ordinance, or voluntary adoption (depending on the local legal picture) by boards of education or other public employing agencies.

The right to organize.—In a few states, the public employees' right to organize is prohibited by law.[1] During the past few decades, however, opposition has decreased, and nearly half our states now affirmatively recognize the right, either in their laws or constitutions.[2] Court decisions and executive orders indicate that in the majority of the states, public employees now have a protected right to join organizations of their own choosing. Although a state may limit or circumscribe the right of organization under certain circumstances (particularly with respect to the uniformed services) it is widely assumed that blanket prohibition against public employee membership in organizations might create grave constitutional difficulties.[3]

There are still cases on the books in a few states which declare the right of a board of education to condition employment on non-membership in an employee organization.[4] While not specifically overruled, these cases appear to be "deadletter" and the trend has been clearly established in the other direction.

What lies at the root of any attempt to prohibit public employees from belonging to "labor" organizations is the government's desire to reduce the probability, through such a threshhold prohibition, of its being subjected ultimately to a strike. The competing interest, of course, is that of the employees' freedom of association and it would appear that the conflict is being resolved more often than not in favor of this latter interest. However, the view is still occasionally propounded today that joining a union which espouses collective bargaining and ultimately the strike is not necessarily a right for public employees comprehended by the constitutional guarantees to peaceably assemble and be heard.[5]

Majority and exclusive representational rights.—A number of state statutes now grant majority and exclusive representational status to qualifying public employee groups including teacher organizations (see statutory analysis in Part II of this volume). It is still the prevailing majority view, however, that without law to authorize exclusive representation, it is illegal for a public employer to grant such status to an employee organization, since such grant would interfere with the employee citizen's right to petition his government,[6] and might constitute a discriminatory conferral of privileges to one organization not tendered to others.

The attorney general in Maryland, for instance, as recently as 1965, expressed the opinion that a board of education in that state did not have authority to grant exclusive recognitional status to an employee organization, and thus accord real and meaningful privileges and "a very real economic benefit" to the majority representative not accorded to others. The opinion states that the grant of exclusive representational status constituted an act of "discrimination and favoritism" which exceeded the board's powers and was contrary to its responsibilities under controlling legislation.[7]

Although the crucial majority right to exclusive representational status is not widely available to public employees as a matter of right (except in states with recent statutes), the concept of majority, exclusive representation has been extended in practice to public employee organizations on a voluntary basis by many public employing agencies, including school boards, across the country. And, quite recently, courts in Illinois and occasionally other states as well, which have no statute on the subject, but much de facto bargaining, have given approval to the voluntary adoption by boards of education of schemes calling for elections and the designation of exclusive representatives, negotiations, and even the signing of a collective labor agreement.[8]

While such court sanctioning of voluntary, discretionary adoption by boards of education of the substance of private sector collective bargaining in the absence of authorizing or enabling legislation on the subject must be considered a minority position among the states, it may well foreshadow a trend.

In recent years, in might be noted, both the NEA (though not necessarily with the agreement of all its state affiliates) and the AFT have endorsed the concept of exclusive representation rights.[9]

The union shop and "union security."—A number of governmental entities have refused—through laws and court decisions—to sanction the union shop in public employment, including school districts, on the ground that requiring union membership as a condition of employment is irrelevant to or inconsistent with the concept of merit. Court cases in several states indicate that it is illegal for a board of education in those jurisdictions to sign a rigorous union security agreement. A number of states that have recognized the right of public employees to join labor organizations also provide for the right not to join in the same legislation. (See analysis of statutes in Part II of this volume). In some states, "right to work" laws, which neither include nor exclude public employees, may be interpreted as denying union shop provisions in public employment.

In the first of two state court cases of interest on the question of union shop for teachers, Benson et al. v. School District No. 1 of Silverbow County et al.,[10] an AFT local had succeeded in including the following clause in its contract with the school board:

> SECTION 2. UNION SECURITY
>
> As a condition of employment all teachers employed by the Board shall become members and maintain membership in the union as follows:
>
> (a) All members now employed by the Board, who are not now members of the Union, must become members of the Union on or before the 4th day of September, 1956. . . .
>
> (b) All teachers now employed by the Board, who are now members of the Union, shall maintain their membership. . . .
>
> (c) All new teachers or former teachers employed by the Board shall become members of the Union within thirty (30) days after date of their employment. . . .
>
> (d) The Clerk shall be instructed to deduct from each teachers' pay check one-half the Union dues in September and one-half in April.
>
> The provisions of the Union Security Clause shall be adopted as a Board Rule and shall be a condition of all contracts issued to any teacher covered by this agreement.
>
> Any teacher who fails to sign a contract which includes the provisions of this Union Security Clause . . . shall be discharged on the written request of the Union, except that any such teacher who now has tenure under the laws of the State of Montana shall not be discharged but shall receive none of the benefits nor salary increases negotiated by the Union.

This is, of course, a union shop clause typical of those found in industrial labor contracts with the exception of the special provision for tenure teachers, who, upon refusal to join the union, were to be frozen at the salary being received at the time of refusal. A tenure teacher who refused to join the union sued to claim her right to the salary increase granted other teachers in the district. The court held simply and without much elaboration that the school trustees had no authority or power under Montana law to discriminate between union and non-union teachers in the manner provided in the clause.

A second case, Magenheim v. Board of Education of District of Riverview Gardens,[11] which provides a possible contrast to the Montana case was decided by the Supreme Court of Missouri in 1960. In this instance, the employment contract between each individual teacher and the board of education provided that if the teacher wanted to receive the benefits provided in the salary schedule he would have to join the National Education Association and two local affiliates. In a suit brought by a teacher for the dues he claimed he had paid involuntarily to the two local associations, the court held that the board had a right to insist on membership in these organizations, saying:

> In the teaching profession as in all professions, membership in professional organizations tends to increase and improve interest, knowledge, experience and over-all professional competence. Participation in such organizations is reasonably related to the development of higher professional attainments and qualifications.

In distinguishing the Montana case just noted, the court opined, "Union membership per se has no connection with teaching competence."

In the light of NEA affiliate negotiating successes along "union" lines in Michigan, Wisconsin and elsewhere the last few years, the Magenheim distinction between unions and "professional organizations" seems clearly dated.

In a recent development of significance, the Michigan Labor Mediation Board has held that a request for an "agency shop" clause is a mandatory subject for bargaining in public employment under Michigan's Public Employee Relations Act, and thus, that inclusion of such a clause in a contract between an employee organization and a public employer is legal in Michigan.[12] (A typical "agency shop" clause provides that while the employees in the bargaining unit do not necessarily have to be-long to the bargaining representative organization, all employees must at least pay a sum equal to the organization's dues [to support cost of representational activities] or lose their jobs.)

The Michigan law on public employee bargaining is silent on the matter of union security clauses, and the Board held that a section in the Act making it unlawful to encourage or discourage union membership ruled out the signing of a union shop or closed shop clause. However, the Board stated:

> The prohibition, however, is the encouragement and discouragement of union membership. A union is required to represent all employees in the bargaining unit in good faith and without discrimination. Thus, union membership is discouraged if employees enjoy the fruits of the union vine without sharing the cultivation of the vineyard. Grapes may not be harvested until the ground has been prepared; the vines planted, trimmed and sprayed; the soil weeded and fertilized. . . .
>
> A requirement that employees pay their share of the cost of negotiating and administrating a collective bargaining agreement neither discourages nor encourages membership in the labor organization selected by the majority of employees in the bargaining unit to represent them. It is not discriminatory, as the requirement that each employee pay his pro rata share of the costs applies alike to all employees in the bargaining unit, whether they are, or are not, members of the union.
>
> . . . an agency shop provision in a collective bargaining agreement is not prohibited by the public employment relations act. . . .[13]

In a vigorous dissent, one of the members of the three-man Board said:

> The idea of "publicness" has been lost in the majority opinion. . . . The safety and welfare of the people must be maintained—which does not allow for union security discharges where workers are in short supply or truly essential such as policemen, nurses, firemen, etc. Government services are not operated with a profit motive, but rather as economically and efficiently as possible—which is frustrated when the supply of workers is not available because of a desire not to join a union; unions being an industrial phenomenon some people seek to escape by working for the government. . . . It is a basic principle of public employment that the merit system was to cure the bad effects of the political "spoils" system—which evils may be continued under another "spoils" system. . . . There is no protection of minority rights in [the Michigan Act], as there are no unfair union practices, no secret ballots for union security, no provisos as to tender of dues, and no positive protection in a suit for fair representation. . . .
>
> Freedom of association and the merit system is violated by saying, "You must

> support a union to work here," just the same as saying, "You must be a Republican or a Catholic to work here." To uphold such a term of employment would be to say that a person can only properly perform the work if he supports the union, which is inane. . . .
>
> It is my conclusion that the general-special statute dichotomy, statutory construction, and sound public policy necessitate a finding that union security is not a mandatory subject of bargaining under [the Michigan public employee bargaining act] . . . .[14]

Should the Board's decision be upheld, one potential problem in the schools will relate to the reconciliation of a contractual insistence that a teacher pay a sum equal to union or association dues or lose her job, with the tenure act which guarantees continuing employment. This problem will undoubtedly find resolution in the courts of Michigan as a number of "agency shop" clauses have already been included in agreements between boards and, particularly, affiliates of the Michigan Education Association. The possibility is being advanced that failure to abide by an "agency shop" clause in a contract between a board and a teacher organization may be ruled just cause for discharge under the state's tenure legislation.

While the Michigan decision is, of course, subject to court appeal and is the result of the interpretation of the unique Michigan statute providing for bargaining between public employees and public employers (patterned closely after our federal, private sector labor legislation), it nonetheless may give indication of what lies ahead in this area in at least some other states. The Wisconsin Education Association, for instance, has, for several years, supported legislation (unsuccessfully, as yet) in that state which will legalize the "agency shop." Many legislatures may well decide, and courts accept, in the years ahead, that a government agency's interest in seeking stability and certainty in labor relations and in encouraging responsibility within the employee organization by adoption of union security outweighs competing interests of the occasionally objecting individual or arguments against union security based on notions of sound public policy.

There is no question but that incorporation of a union security clause into a public employment contract will be held to constitute "state action," and certain constitutional questions involving free speech, free association, due process and equal protection can thus be raised as to the legitimacy of such clauses which have as yet not been definitively resolved by any state or federal courts.[15] Objections which might be raised on constitutional grounds are, to some extent, the converse of those which arise from attempts to prohibit organization of public employees. Of course the "agency shop" variant of union security might avoid in theory, if not in fact, some of the possible constitutional and policy objections which may be advanced.

At least it would seem certain that to the extent that union security agreements are adopted in public employment, protections of the sort now observed under even private sector union security clauses will have to be guaranteed. These protections will relate, most importantly, to an employee's freedom from discharge for any reason other than failure to tender to the employee organization regular non-discriminatory dues and initiation fees (or a sum equivalent to dues under an "agency shop" provision) and assurance that sums exacted under a union security agreement will be used primarily to underwrite the costs of maintaining the bargaining relationship and not for "political purposes."

The adoption of widespread union security in public employment and any attempt at prohibition of expenditure of dues for political or lobbying purposes poses a rather serious and unique problem in public employment. As Kurt Hanslowe has recently observed:

> In the public sector, political activity is unavoidably part and parcel of the process of bargaining with politicians. Thus, there arises the possibility of involuntary contributions to organizational support of politicans who, while ready to improve the working conditions of public employees, on other questions take positions of which such public employees disapprove. Unless careful protections are worked out, enabling individual public employees to "contract out" from compelled support of unwanted political parties, politicians, and public bodies, the union shop in public employment has the potential of becoming a neat, mutual backscratching mechanism, whereby public employee representatives and politicians each reinforce the other's interests and domain, with the individual public employee and the individual citizen left to look on, while his employment conditions, and his tax rate, and public policies generally are being decided by entrenched and mutually supportive government officials and collective bargaining representatives over whom the public has diminishing control.[16]

Also of recent significance, the New Hampshire Supreme Court has ruled[17] that union security clauses may be included in public employment labor agreements in that state. In a decision offering little in the way of analysis, the Court noted that "In the present case the police commissioners and the union have, in effect, declared in advance under the collective bargaining agreement that union security is a reasonable requirement for the efficient and orderly administration of the police department."[18]

The right to negotiate and contract.—As for the right to bargain, defined as the right merely to meet and talk with a public employer, over a third of our states now provide by statute (see Part II of this volume) that municipal employers may or must meet with employee representatives and allow for the presentation of employee proposals or grievances. Conversely, a few states prohibit "negotiations" (thus, eviden ly, interaction of any kind) between public employee representatives and employers. In most of the states, however, there are no applicable statutes and in most instance employers are probably free to undertake at least "consultation" or discussion with their employees, if they wish.

The doctrine of illegal delegation of authority—which has been so potent in forestalling bargaining in the public service and in denying to public employers the right to negotiate binding collective agreements with employee groups—is under attack in both theory and practice. The doctrine has been gradually relaxed in recent years,[19] as discretion has been granted increasingly to administrative officials in government and it appears that the doctrine's demise as an effective block to negotiating activities in public employment is reasonably certain.

Statutes in a number of states (see Part II, this volume) now provide the public employer with the right to enter into contracts with the organization representing his employees. However, many other states have laws, court decisions, or attorney general opinions declaring that public agencies cannot sign collective agreements with employee organizations, and that to do so in the absence of statutory authorization constitutes an illegal delegation of authority; this is still unquestionably the majority view.[20]

In addition to recent statutory sanctioning of public employee labor agreements, courts are increasingly (in what is still a minority position, however) declaring such contracts valid on the grounds that most governmental agencies (school boards included) have implied authority, pursuant to the statutes under which they operate, to conduct their business in the most effective and efficient manner possible and that that authority extends to the right to collectively contract for terms and conditions on which labor is to be supplied.[21]

Actually, when the doctrine of non-delegability is interposed as a bar to the authority of a public agency to collectively bargain or contract for labor services, the concept is rarely analyzed and appears often to be illusory. The cases rarely make a distinction, for instance, between 1) the collective bargaining process (the act of negotiating) and 2) the actual signing of a bilateral agreement which may be intended by the parties to be binding and enforceable. Certainly, the act of engaging in bargaining, negotiating, "consulting," "meeting and conferring," or whatever, with an employee organization does not, per se, seem to constitute, under any possible definition of the term, a delegation of authority by the public employer engaged in the bargaining. The requirement to bargain, even under the law applicable to the private sector, does not carry a corollary requirement to abdicate responsibility, to capitulate on any given demand, or even to reach an agreement. Of course, while concessions and compromises are not demanded by the legal concept of "good faith" bargaining, it is a practical fact, whether in the public or private sector, and whether the strike is prohibited or not, that in the context of the power relationship which marks true collective bargaining, matters discussed for the purpose of mutual decision-making are often compromised when they become subjects of dispute between the parties. However, none of the cases denying bargaining power to public employing agencies on the grounds of non-delegability do so on the basis of such a recognition of the true realities of the collective bargaining process.

The signing of a contract by a public employing agency for a fixed period on terms and conditions of employment does, of course, if the agreement is legally binding and valid, result in a relinquishment of the public employer's continuing discretion over those terms and conditions. School boards and other public employing bodies, though, do have and regularly exercise such powers to contract and bind themselves in other areas. Clearly the question of the power to enter collective bargaining agreements turns most appropriately on the statutes constituting school boards and other public employing agencies. With regard to affirmative power to sign labor agreements, most such statutes are silent, but proponents of the existence of board power rely on the doctrine of implied powers,[22] and as we have noted, recent cases, while still a minority, may constitute a discernible trend in the direction of finding such implied powers in school boards for purposes of authorizing the signing of collective labor agreements.

Subsidiary problems sometimes mentioned include: 1) the authority of boards of education or any public employing bodies to contract beyond their terms of office, 2) the question of the possible immunity under certain circumstances of boards of education to suit, and 3) the standing of unions to sue in the states as unincorporated associations. With respect to the question of contracting beyond term of office, it seems well established that boards of education in the U. S. may make individual contracts of hire which are to run beyond the board's term, subject to requirements of good faith and reasonableness.[23] And, of course, school boards regularly sign contracts which run beyond the term of at least some of the members of the board for buildings, purchase of materials, etc. Once it has been acknowledged in a jurisdiction that collective employee agreements are otherwise valid, there would seem no compelling reason to distinguish between the collective labor agreement and other contracts with respect to the term for which they could run and the problems involved in binding successor boards. As to the other items, school boards and municipalities generally are seldom any longer given the benefit of sovereign immunity in suits founded on contract, and for the most part, the standing of union organizations as unincorporated associations is no longer posing a significant impediment to suits in state courts by or against unions.

Legal problems of significance will increasingly arise in the future with respect to 1) individual contract clauses which may conflict with specific board powers over which a statute may be held to demand continuing discretion, 2) clauses which may conflict with specific statutory language already controlling a given term or condition of employment, 3) the concept of ultra vires, and 4) the problem (closely related to the others) of mandatorily bargainable subject matter in states with bargaining statutes. Both in states with statutes, and in states without, concern will shift shortly from problems involving the right to bargain and sign a collective labor agreement with an employee organization to questions of enforceability of particular clauses in the contract.

The outlines of this problem are just emerging. An arbitration case[24] decided in 1965 under the terms of the New York City Board of Education-United Federation of Teachers Agreement first raised some of the large issues involved and seems to foreshadow some of the problems with which courts will be asked to grapple in the near future even in those jurisdictions which have by statute granted bargaining rights to public employees. The Arbitrator was asked to judge the arbitrability of a grievance requesting compensatory time-off to the extent that duty-free lunch periods provided for in the Agreement between the parties were denied to the grievant and other teachers (the New York Board-UFT Agreement provides that every elementary school teacher is to have duty-free lunch period of 50 minutes).

In claiming that the grievance was not arbitrable, the Board of Education urged that it could not legally delegate to an Arbitrator its discretion as to matters entrusted to it by law, including the responsibility for the allocation of public funds. The Board argued that it was limited by applicable law and that it could not accede to the request of the Union that "the law be violated by the Arbitrator's exercise of the Board's exclusive non-delegable responsibility for the determination of the extent of the needed instruction and also for the uses to which it will devote its available funds." The Board stated further that the important underlying problem was "how to make beneficial use of arbitration in the area of government employment in view of the inability of governmental bodies to delegate their powers and responsibility, including particularly their responsibility to allocate and to administer the limited funds available for essential public service." The Union urged that none of the restrictions on arbitration in the Agreement were applicable to the case, and that absent compelling evidence to the contrary, the assumption should be that "the Parties have the power to bargain and make an enforceable agreement with regard to a duty-free lunch period."

As a prelude to his discussion and findings, the Arbitrator said:

> We deal here with an understandably uneasy coexistence which is inevitable in a situation where a branch of government which is an employer finds itself in what must be an unhappy situation, restricted by the law and applicable principles to which it owes its existence and responsibility on the one hand, and a union and its membership which have subscribed to the principle that differences shall be resolved by peaceful appropriate means, without interruption of the school program, but who now find the limitations asserted by the Board on the right to enjoy the fruit of full and unrestricted arbitration irksome and frustrating. In short, we have here the thorny question of the appropriateness of the use of traditional labor arbitration for the settlement of disputes in governmental employment.[25]

After an exhaustive discussion of precedent and principle which led to a finding that "under the State Education Law as well as under the practice of the Board, it is not permitted to delegate its fiscal responsibility, . . ." the Arbitrator concluded that "the Board can not delegate to the Arbitrator its responsibility for determining how to allocate its available funds." He added:

> Educational policy and its implementation are inevitably bound by and tied to fiscal, budgetary considerations. Therefore, the redelegation of the right to grant relief of the type sought here is an unauthorized interference with the powers and responsibilities granted by the New York State legislature to the board of education.[26]

Thus, it was held that the grievance, requesting "time-off" for the alleged failure to provide free lunch periods as required by the Agreement was not arbitrable.

While one might quarrel with the result of this case, and while arbitrators in New York City and elsewhere have rendered decisions under contracts in schools which have had budgetary implications (at least on a small scale), the issues posed here are the type we can confidently expect courts to be dealing with as enforceability is sought by teacher organizations of increasingly complex bargaining agreements in the years which lie ahead.

In a recent Michigan case of interest,[27] an AFT local sued the Imlay City Community Schools Board of Education to enforce a contract agreement requiring the school district to take advantage of federal funds available for special and remedial programs. The Court found that the School Board, in its contract with the Federation, had indeed agreed to apply for benefits (federally-funded) to be provided for a HeadStart program for the school year in question. The Court, in holding, in effect, that the decision as to whether or not to initiate a HeadStart program in the school district was a policy matter over which the Board had the obligation to maintain continuing discretion, and on which it could not bind itself by contract for the future, stated:

> An agreement which controls or restricts, or tends or is calculated to control or restrict, the free exercise of discretion for the public good vested in a public officer or board is illegal, so that no redress can be given to a party who sues for himself in respect of it. [Citation omitted]
>
> Enforcing this rule in 1871, the Michigan Supreme Court said, "Indeed it is impossible to predicate reasonableness of any contract by which the governing authority abdicates any of its legislative powers, and precludes itself from meeting in a proper way the emergencies that may arise. Those powers are conferred in order to be exercised again and again, as may be found needful or politic, and those who hold them in trust today are vested with no discretion to circumscribe their limits or diminish their efficiency, but must transfer them unimpaired to their successors. This is one of the fundamental maxims of government, and it is impossible that free government with restrictions for the protection of individual rights could long exist without its recognition." [Citation omitted]
>
> Counsel for the plaintiff teachers' federation concedes the general rule to be as stated by the court, but argues that the legislature by adopting [the public employee bargaining act in Michigan] intended to modify this principle and to authorize a school board to make such a contract as this.
>
> If, as asserted by plaintiff, a school board may surrender control of educational policies to teachers by contract, so too may a County Road Commission by contract surrender control of selection of road projects to its employees and so too may a City by contract surrender control of the area to be protected from fire to its firemen.
>
> The contract with which we are concerned goes full range. It, by its terms, requires participation in all Federal Programs within certain categories without regard to cost or local need.
>
> I am unable to find from the language of the statute, or otherwise, a legislative intent to make such a sweeping alteration in the structure of government.

> Rather it is my opinion that the legislature intended to authorize collective bargaining with public employees with respect to working conditions within the framework of policies and projects selected, from time to time, by duly elected officials.[28]

A closely related question, of course, involves the issue of what boards or other public agencies must or are empowered to bargain about, particularly in states with statutes making bargaining mandatory (for a discussion of definitions of bargainable subject matter in state statutes, see Part II, this volume). As we have already noted, it has been held in Michigan that agency shop clauses are manditorily bargainable in that state, and as we shall discuss infra, courts and labor boards in several jurisdictions have ruled that binding arbitration clauses as terminal steps in grievance procedures may be included in school board contracts and are manditorily bargainable subjects. In a recent case, the Wisconsin Supreme Court ruled[29] that under the public employee bargaining statute in that state the school calendar was a negotiable issue since it had a direct and intimate relationship to teacher salaries and working conditions. Increasingly in the years which lie ahead state courts, particularly in jurisdictions which have bargaining statutes, will have occasion to pass on questions of bargainability.

On the practical side, boards and administrators about to begin negotiations with teacher organizations are often most concerned about what they can, should, or must bargain over. The essentially political nature of the legislative determination and control of salaries and other conditions of employment for public employees makes the problem acute in some jurisdictions. In some teacher negotiating situations, the administration, if not the teacher organization, seems convinced that headway has been made in defining those areas that will remain "managerial prerogatives," not subject to bargaining, and those matters which are "fair game" for the negotiating table. However, consideration of the following does not make one confident that hard and fast rules on what is or is not negotiable are likely to be forthcoming quickly on the teacher bargaining scene:

1) The dynamics of any union-management relationship demands an ever increasing scope for union action and concern (for example, under the law applicable

to private industry, the concept of bargainable subject matter has constantly expanded over the years).

2) Teachers, because of their professional relationship with the school system, are concerned with, knowledgeable about, and often wish to discuss, the entire range of the school's problems and activities.

Grievance procedures.—There has been a trend in the last decade to provide some at least rudimentary grievance procedures through state legislation to handle individual employee complaints in public employment. In numerous states, a public employees' right to present a grievance is protected by law and specific grievance machinery has been established by statute, executive order, or municipal ordinance in many jurisdictions. In most cases, the final step in such grievance procedures consists of non-binding (advisory) arbitration, mediation, conciliation, or fact-finding. Grievance procedures have also been adopted voluntarily by numerous governmental employing agencies, including many school systems. Often these procedures have been installed in the absence of any relationship with a collective employee organization.

Binding arbitration.—Agreements in public employment to submit disputes to binding arbitration often meet the same objection—illegal delegation of governmental authority—as does the signing of a collective contract. However, a number of recent court cases have progressively relaxed the prohibition against binding arbitration in governmental operations and public agencies in a number of states now have the right to agree to submit to arbitration grievances over the interpretation or application of the collective agreement. It is not likely, though, that submission of the basic terms and conditions of the collective agreement to binding arbitration will be widely permitted or practiced in the forseeable future.

The New Hampshire Supreme Court,[30] in the same case declaring the union shop to be legal in public employment contracts in that state, has also ruled that the inclusion of a binding arbitration clause as the terminal point in the grievance procedure is appropriate for inclusion in collective agreements in that state. Also, the Wisconsin Supreme Court[31] has recently ruled that an arbitration clause contained in a public employee contract is binding upon the city signing the agreement and is specifically enforceable in the courts. In Michigan, a circuit court judge has enforced an agreement for binding arbitration of contract disputes against a school district.[32] Most recently, in the same case which ruled on the legality of the "agency shop" clause in public employment contracts in Michigan, the Michigan Labor Mediation Board ruled that binding arbitration clauses constituted bargainable subject matter under the Michigan Public Employment Relations Act.[33] The unanimous opinion on the arbitration question by the Michigan Board cited with approval the following language of the trial examiner in the case:

> It is incongruous that public employers under jurisdiction of the Act may submit to arbitration disputes involving contracts covering varied subjects such as purchases of supplies, services and construction, and yet be precluded from submitting grievances to arbitration only because they appear in the industrial relations context.[34]

Clearly, these recent decisions would seem to presage a trend toward legitimizing binding arbitration for resolution of grievances under a negotiated contract, at least in those jurisdictions which have by statute supported collective negotiations for public employees.

In only one jurisdiction, Rhode Island, has binding arbitration of contract disputes, as distinguished from binding arbitration of grievances arising under an already negotiated contract, been made mandatory for school boards and teacher organizations. Such compulsory arbitration in that state is limited to matters "not involving the expenditure of money." (See Part II, this volume)

The strike.—Legislative and judicial positions on the question of strikes by public employees, including school teachers, have been traditionally quite clear. Both the federal government and the states, through laws and virtually unanimous court decisions, prohibit strikes by public employees (for analysis of statutory prohibitions, see Part II, this volume). This is likely to remain the situation despite some support for the position that at least certain categories of public employees (e.g., those serving in "non-essential" areas) should be allowed to strike under certain circumstances. The related problems of effective public service strike prohibition, and the fashioning of strike alternatives for the equitable settlement of bargaining impasses remain, of course, the critical unresolved issues relating to bargaining in the schools and in public employment generally.

There has been much discussion relating to strike prevention and the utilization of strike alternatives to make bargaining meaningful in the schools and elsewhere in the public service. The "traditional" position, and that embraced by governor's commissions in Illinois,[35] New York,[36] and New Jersey[37] charged with making recommendations on appropriate public employee bargaining legislation for those states, is to the effect that the grant of strike power in public employment would be wholly inappropriate and that fact-finding and various forms of binding and non-binding arbitration must be substituted for the strike. The argument advanced, in effect, is that most governmental operations, including schools, have been established by the public as monopolies, which provide products and services for which there are seldom close, readily available substitutes. The still viable and powerful sanctions of the competitive market are not often operative to provide a measure of discipline to the behavior of the parties to bargaining in public employment and to guarantee that the resulting bargaining "deal" will not be altogether at someone else's expense. It is hypothesized that if the strike right is granted in public employment, large and strong organizations will benefit at the expense of the unorganized or at the expense of the relatively small and unimportant organizations and possibly at the expense of the public at large. It is noted that, in any event, practically speaking, the public will not allow itself to be inconvenienced by a grant of power to strike against monopolies that it itself has established to provide relatively essential services. Of course, once it has been decided that as a matter of public policy strikes in the public sector should not be allowed, the additional problem remains as to kinds of strike prohibitions which might be effective. (For statutory solutions to date, see Part II, this volume.)

Those offering interesting alternatives to total strike prohibition have suggested that strikes might be allowed only if a public employer rejects the recommendations of a fact finder,[38] or that the solution may lie in fact finding coupled with show cause hearings in the event of rejection of fact finder's recommendations, and the lodging of discretionary power in the courts when injunctions are sought.[39] It is hoped by some that an "arsenal of weapons" approach (including injunction), but without the injunction being automatic, would provide, with its uncertainty, a measure of incentive to the parties to settle short of ultimate impasse.

It has been traditionally presumed that the government has the right to outlaw strikes against itself. For instance, Hanslowe has observed:

> If there be any doubt about governmental authority to outlaw the concerted withholding of labor by public employees, it might be recalled that government clearly has, and has asserted, the power to outlaw rig bidding on government contract in combinations to fix the price of goods sold to the government, as officials of several electrical manufacturing firms learned by going to jail a few years ago. There may be no duty on the part of individuals to deal with the government, but if one does so deal the government can take the position that one cannot conspire or combine against it.[40]

And, indeed, in recent cases, not only strikes but "sanctions" have been outlawed and punished with regularity in the state courts.[41] However, it might be noted that in a recent, important case,[42] the Michigan Supreme Court raises some doubts, for that state at least, as to the possible limits of legislative powers for strike proscription in refusing to sanction the virtually automatic issuance of an injunction in a teacher strike. Holding the Michigan public employee anti-strike law valid ("the sovereignty may deny to its employees the right to strike") the Court nonetheless ruled that:

> The only showing made to the Chancellor was that if an injunction did not issue, the district's schools would not open, staffed by teachers, on the dates scheduled for such opening. We hold such showing insufficient to have justified the exercise of the plenary power of equity by the force of injunction.[43]

The Court added,

> To attempt to compel, legislatively, a court of equity in every instance of a public employee strike to enjoin it would be to destroy the independence of the judicial branch of government.[44]

The law relating to picketing by public employees is in a relatively nascent stage, though it has been held that if picketing has the effect of disrupting the operations of a public agency it is illegal and can thus be proscribed and enjoined.[45] However, the Supreme Court of California[46] recently struck down as "unconstitutionally overbroad" an injunction issued against striking social workers which prohibited, in part:

> . . . picketing or causing picketing, or "causing, participating in or inducing others to participate in any demonstration or demonstrations" on any grounds or street or sidewalk adjoining grounds owned or possessed by the County on which structures are located which are occupied by county employees or in which such employees "are assigned to work."[47]

The Court found that the order:

> . . . improperly restricts the exercise of First Amendment freedoms, and further that it is too vague and uncertain to satisfy the requirements of notice and fair trial which are inherent in the due process clause of the Fourteenth Amendment.[48]

For teachers and public employees generally, the legality of various forms of concerted activity will undoubtedly be the source of much dispute and litigation in the years ahead as negotiating in the public sector matures.

FOOTNOTES

1. E.g., Alabama, North Carolina.

2. E.g., Wisconsin, Massachusetts, California, New Jersey.

3. First, Fifth and Fourteenth Amendment Constitutional guarantees of right to peaceably assemble and petition the government, right of free association, right to freedom from deprivation of liberty without due process, etc.

4. See, e.g., People ex rel. Fursman v. City of Chicago, 278 Ill. 318, 116 N.E. 158 (1917).

5. NEVADA, OP. ATT'Y. GEN. 494 (Reported in 243 GERR D-1).

6. Attempts have been made to avoid this objection in public employment labor agreements by reserving the right of the individual employee to present his own grievance and to insist on meeting individually with his employer if he wishes to make his concerns known.

7. MARYLAND, OP. ATT'Y. GEN. (Sept. 16, 1965).

8. See, Chicago Division of Ill. Education Association v. Bd. of Ed. of City of Chicago, 222 N.E. 2d 243 (Ill.) (1967).

9. NATIONAL EDUCATION ASSOCIATION, GUIDELINES FOR PROFESSIONAL NEGOTIATION, p. 12 (1963); AMERICAN FEDERATION OF TEACHER PROCEEDINGS, 1964, p. 86.

10. 344 P. 2d 117 (Montana) (1959).

11. 347 S. W. 2d 409 (Missouri) (1961).

12. Oakland County Sheriff's Dept. v. Metro. Council #23, AFSCME, AFL-CIO, Michigan Labor Mediation Board Case #C66F63 (January 8, 1968), reported in 237 GERR, F-1.

13. Id., Decision and Order, p. ___.

14. Id. Concurring and Dissenting Opinion, Board Member Weiss.

15. See, Note, Labor Relations in the Public Service, 75 HARV. L. REV. 391 (1961).

16. HANSLOWE, THE EMERGING LAW OF LABOR RELATIONS IN PUBLIC EMPLOYMENT 115.

17. Tremblay v. Berlin Police Union, New Hampshire Supreme Court, June 30, 1968, reported in 232 GERR D-1.

18. Id. at p. ____.

19. See, Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940); DAVIS, ADMINISTRATIVE LAW 30 (1965).

20. See, e.g., City of Los Angeles v. Los Angeles Building and Construction Trades Council, 94 Cal. App. 2d 36, 210 P. 2d 305 (1959); Perez v. Board of Police Commissioners 78 Cal. App. 2d 638, 178 P. 2d 537 (1947); Nutter v. Santa Monica, 74 Cal. App. 2d 292, 168 P. 2d 741 (1946); Miami Water Works Local 654 v. City of Miami, 157 Fla. 445, 26 So. 2d 194, 165 A. L. R. 967 (1946); Mugford v. Mayor and City Council of Baltimore, 185 Md. 266, 44 A. 2d 745 (1945); City of Springfield v. Clouse, 356 Mo. 1239, 206 S. W. 2d 539 (1947); Petrucci v. Hogan, 27 N. Y. S. 2d 718 (1941).

21. See, e.g., Norwalk Teachers' Association v. Board of Education, 138 Conn. 269, 83 A. 2d 482 (1951); Electrical Workers Local #266 v. Salt River Project Agricultural Improvement and Power District, 78 Ariz. 30, 275 P. 2d 393 (1954); Local 611, I. B. E. W. v. Town of Farmington, 405 P. 2d 233 (New Mexico) (1965); Chicago Div. of Ill. Educ. Association v. Bd. of Ed. of City of Chicago, 222 N. E. 2d, 243 (Ill.) (1967).

22. See, Comment, Public Employee Collective Bargaining Contracts: The Chicago Teachers, 33 U. OF CHI. L. REV. 852, 857.

23. See, Tate vs. School Dist. of Sentry County, 324 Mo. 477, 23 S. W. 2d 1013, 70 A. L. R. 794 (1949); Stokes v. Newell et al., 174 Miss. 629, 165 So. 542 (1936).

24. In the Matter of the Arbitration between Board of Education of the City of New York and United Federation of Teachers, Opinion (Israel Ben Scheiber, Arbitrator), issued June 7, 1965; reported in 92 GERR, Griev. Arb. #27.

25. Id. at p. ___.

26. Id. at p. ___.

27. Nickels v. Board of Ed. of Imlay City Community Schools, Lapeer County Circuit Court, File #1546 (Mich.) (January 3, 1967).

28. Id. at p.___.

29. Joint School District No. 8, City of Madison v. Wisc. Employment Relations Board, Wisconsin Supreme Court No. 105 (December 29, 1967); reported in 57 LABOR CASES 51, 806.

30. See *supra* note 17.

31. Local 1226 v. City of Rhinelander, Wisconsin Supreme Court No. 245 (June 6, 1967), reported in 198 GERR B-1.

32. Local 953 v. School Dist. of Benton Harbor, Berrien County Circuit Court, Case No. C-6229E (Oct. 12, 1967), reported in 216 GERR E-1.

33. See *supra* note 12.

34. Id. at p.___. The Mediation Board after noting that "Public entities have power to enter into enforceable contracts to arbitrate disputes involving commercial transactions" cited the following authority:

> 10 McQuillin, Municipal Corporations, 3rd Ed., Sec. 29.194, p.495: "Municipal contracts are measured by the same tests and are subject to the same rights and liabilities as are other contracts." McQuillin continues: "A contract may provide for submission of disputes arising thereunder to arbitration***." (pp. 497,498) 5 Am.Jur. 2d 569, Arbitration and Award, Sec. 67: "A state or its agencies may enter into a valid contract with private parties providing for the arbitration of disputes that may arise under the contract. ***." 40 A.L.R. 1370: "It is well established that a city has the power to submit to arbitration any claim asserted by or against it, whether based on contract or tort, in the absence of a statutory prohibition. This power is based on the right to contract and the right to maintain and defend suits." See, also, *Hotard V. New Orleans*, 213 La 843, 35 S.2d 752 (1948), and *Madison v.* Frank Lloyd Wright Foundation, 20 Wis. 2d 361, 122 N.W. 2d 409 (1963). [Id. at p___.]

Additional cases which support the Board's citation of authority: C.J. Wood v. Sequoia Union High School District, 199 Cal.App. 2d 433, 18 Cal. Rep. 647 (1962); Clifton Applegate and Tool v. Big Lake Drainage District #1, 82 Mont. 312, 267 P. 207 (1928); London Guaranty and Accident Co., Ltd., v. Los Lomitas School Dist. of San Mateo County, 191 Cal.App.2d 423, 12 Cal.Rep. 598 (1960; So. Surety Co. v. Seeley Indep. School Dist., 10 S.W. 2d 786 (Texas Civ. Ap.), (1928).

35. STATE OF ILLINOIS. REPORT AND RECOMMENDATIONS: GOVERNOR'S ADVISORY COMMISSION ON LABOR-MANAGEMENT POLICY FOR PUBLIC EMPLOYEES, March 3, 1967.

36. STATE OF NEW YORK. GOVERNOR'S COMMITTEE ON PUBLIC EMPLOYEE RELATIONS, March 31, 1966.

37. STATE OF NEW JERSEY. REPORT OF NEW JERSEY PUBLIC AND SCHOOL EMPLOYEES' GRIEVANCE PROCEDURE STUDY COMMISSION, reported in 229 GERR D-1 (Jan. 29, 1968).

38. R. DOHERTY AND W. OBERER, SCHOOL BOARDS AND COLLECTIVE BARGAINING: A CHANGING OF THE GUARD 105 (1967).

39. STATE OF MICHIGAN. REPORT OF GOVERNOR'S ADVISORY COMMITTEE ON PUBLIC EMPLOYEE RELATIONS, February 15, 1967.

40. HANSLOWE, op. cit. supra note 16, at 30.

41. Board of Education v. Redding, 32 Ill. 2d 567, 207 N.E. 2d 427 (1965); Bd. of Education, Borough of Union Beach v. New Jersey Education Association, N.J. Superior Court, Monmouth County Docket #C-2255-66 (Aug. 4, 1967), reported in 207 GERR D-4; William Block et al. Woodridge Township Federation of Teachers, Local 822, AFT, AFL-CIO charged with contempt of court, Supreme Court of New Jersey, Case A24, (Dec. 18, 1967), reported in 225 GERR D-1; Matter of Ruth M. Buehrer et al., Defendants, New Jersey Supreme Court #A2, (Dec. 18, 1967), 57 CCH Labor Cases, Par. 51, 798.

42. School District for the City of Holland v. Holland Education Association et al., Michigan Supreme Court (1968), reported in 239 GERR D-1.

43. Id. at p.___.

44. Id. at p.___.

45. Board of Education v. Redding, 32 Ill. 2d 567, 207 N.E. 2d 427 (1965).

46. In re Colin Berry et al., Supreme Court of California, Crim. 11117 (Jan. 24, 1968), reported in 231 GERR D-1.

47. Id. at p.___.

48. Id. at p.___.

COLLECTIVE ACTION BY PUBLIC SCHOOL TEACHERS

VOLUME II

The Law and Collective Negotiations in Education

PART II

THE STATUTORY RESPONSE

PART II: THE STATUTORY RESPONSE

Government has become the major source of employment since 1947,[1] and the state and local government employment sector is the largest and fastest growing.[2] Accompanying this rise in employment has been a tremendous growth in trade union membership among government employees.[3] As these unions attempt to establish the right of public employees, through their duly selected organizations, to participate in bilateral determinations of wages and working conditions with public employers, the number of illegal strikes disrupting public services has increased sharply.[4] Many governmental employers have responded to this new challenge by insisting on strict enforcement of the traditional rule that there is no right for any group of public employees to share in the determination of working condtions unless the legislature specifically directs that collective bargaining occur. Indeed, some have refused even to engage in nonbinding discussions with public employee representatives. Partly as a result of these refusals to bargain, the atmosphere has become charged with resentment and strife that periodically threaten to erupt into massive disruptions of public services.

To forestall these possible dislocations, many state legislatures have attempted to provide alternatives to the use of the strike by enacting statutes which compel government employers to submit to bilateral determinations of working conditions with public employee organizations. In providing such alternatives, a number of issues have had to be resolved. Initially, the legislators had to decide whether the traditional rule prohibiting the sharing of governmental power to establish working conditions should be modified by requiring public employers to engage in collective bargaining. Moreover, if bargaining was to be required, the legislators had to determine if any rules were necessary to insure that both sides had the capacity to engage in bargaining. For example, were the employee organizations to be "recognized" by public employers; if so, was such "recognition" to carry the same rights and obligations found in private sector collective bargaining? Further, should the representatives of governmental units actually negotiating be authorized to enter into final agreements? In addition, the difficult question of whether uniform administration of the new program by state authorities would be more conducive to peace than permitting local authorities to establish their own procedures had to be resolved. If centralized administration were chosen, the legislators had to confront the issue of whether the existing state labor relations agencies or civil service departments were competent to oversee the new scheme or whether new agencies would have to be created. Probably the most difficult problem facing the legislators was what, if anything, could be substituted for the utilization of the strike by public employees to consolidate their positions and to guarantee their effective participation in the determination of working conditions during bargaining impasses. Finally, the legislators had to decide whether public employees were homogeneous enough to justify extending all-inclusive statutory coverage or whether certain groups deserved separate treatment.

A. The Statutes: An Overview

A total of thirty-eight states have fashioned rules attempting to deal with the organization of public employees and their demand for collective bargaining.[5] The great majority[6] has attempted either to set up simple mechanisms recognizing the right of public employees to bargain with governmental units and establishing procedures to facilitate the settlement of bargaining disputes or to promulgate comprehensive rules governing all facets of public employee labor relations.

Although all the statutes have excluded political appointees from coverage, various methods of extending the new rules to other public employee groups have been utilized. One argument to justify the enactment of a single piece of legislation covering all public employees contends that the problems facing attempts to institute collective bargaining and dispute settlement procedures are the same irrespective of which group of public employees is involved.[7] Another view has it that the public education enterprise is unique and that teachers as professional employees deserve separate treatment. One group of states has responded by enacting a set of rules for municipal, county, and state employees and another set for teachers.[8]

Still another school of thought urges that municipal and state employees face different labor relations issues and should operate under separate employment relations schemes. In response, some states have passed one statutory scheme for municipal employees and teachers and enacted another set for state employees.[9] Other states, perhaps reacting to the powerful legislative lobbies of state administrators, have enacted separate schemes for municipal employees and teachers, without attempting to deal with the labor relations problems of state employees.[10] A final group of state statutes has afforded special statutory treatment to firemen.[11]

B. The Creation of Collective Bargaining Rights

Partly in response to traditional rules disallowing collective bargaining in the public service, a number of states, as we have noted, have attempted to grant public employees a more effective voice in the determination of their working conditions. The "strength" of a state's policy can be determined by the extent to which it provides features of private-sector bargaining necessary to the creation of an effective relationship. First, it is deemed crucial to afford public employees the right to join together in organizations established to promote their collective interests, and to allow those organizations to bargain with public employers with respect to wages, hours, and working conditions. Second, to forestall useless arguments during contract negotiations concerning the extent of an employee organization's authority to speak for the employees and to prevent the undercutting by rival organizations of a bargaining agent's ability to represent the employees, public employers may be authorized to "exclusively recognize" employee organizations as representatives empowered to speak for the employees. Third, if it is desired that bargaining is to result in acceptable determinations of working conditions for both parties, each side may be obligated to bargain with the other in good faith, and a device must be created by statute to enforce that obligation. Finally, if bargaining is to produce mutually enforceable obligations, a policy will probably require written contracts expressing those obligations. If agreements can be abrogated after their promulgation, then the process used to reach accord may be discredited, and other, less peaceful tactics may be substituted.

The statutory schemes implementing a "negotiating" or "bargaining" policy can be divided into four groups. Some schemes have attempted to deal with these problems without granting any of the rights associated with collective bargaining.[12] Although one might argue that the mere establishment of any type of scheme dealing with public employee labor disputes impliedly sanctions collective bargaining, thereby negating a need for specific statutory language mandating bargaining, most state legislatures have found it desirable to draft such language to avoid unnecessary dispute over how far the implication from the language extends. A number of states dealing with the question[13] recognize that public employees have a right to organize and authorize collective bargaining or negotiations between public employees and their employers but do not require public employers to bargain. A third group[14] grants public employees the right of self-organization and specifies that public employers must meet with or bargain in good faith with groups seeking to represent employee interests, but fails to provide machinery to enforce the good faith mandate or any of the positive duties created. A few states[15] require good faith bargaining, creating a statutory machinery to enforce that obligation, and compelling the parties to reduce their agreements to writing.

C. Designation of Employee Representatives

Procedures detailing the method of choosing employee representatives may be essential to the maintenance of peace in the public sector as a substitute for the use of the recognition strike to resolve disputes over representation. The first step for any policy seeking this objective will be a determination of which public employees will be allowed a voice in the choice of the employee organization to be designated as bargaining agent. Not all statutory schemes have considered the problem of the delineation of bargaining units.[16] Of those that have responded, most have established some type of centralized authority to oversee the determination of appropriate units when representation disputes arise and when one or both parties petition for a ruling.[17] Some schemes, however, have elected to leave this task in the hands of local public authorities.

Part of the substantive debate concerning unit determination centers, as it does in the private sector, on whether supervisory personnel and certain types of professional employees are to be excluded from bargaining units and denied a vote in representation elections.

Most of the schemes have transfered the criteria for unit determination from procedures adopted for the private sector which exclude supervisory and professional personnel from bargaining units without considering whether public service employees need different rules governing the establishment of bargaining units.[18] Yet, unlike their counterparts in the private sector, public service supervisors rarely are granted the right to make final determinations of employment policy since that power has been reserved to legislative bodies. As a result, many supervisors may have grievances identical to those expressed by regular employees and lack effective channels for presenting demands to the public employer.

Where the issues in unit determination have been considered to require new approaches for public employees, the emphasis has been placed on finding a "community of interest" among employees regarding conditions of employment, the continuation of a traditional, workable, and satisfactory negotiating pattern, the perpetuation of specialization of occupation, the manner in which the right of representation is exercised, and the functional distribution of decision making authority within the governmental unit concerned.[19] Under this test, supervisors could be included within bargaining units.[20]

The general failure to develop special criteria for unit determination in the public sector is especially troublesome when school teachers seek representation. Not only is the supervisor issue present, but the present of "satellite" personnel—part-time classroom teachers, substitutes, and other supportive but certified employees—further complicates the method of proper unit delineation. With the exception of the Connecticut Teachers Act, the statutory schemes enacted specifically to handle teacher employee relations problems do not consider in detail the problem of unit determination, and any conclusions about appropriate teacher bargaining units must be inferred from the types of teaching personnel covered by the laws.[21] In Connecticut,[22] three types of bargaining units are delineated: a comprehensive unit including all certified personnel below the rank of superintendent; a unit excluding supervisory and administrative personnel; and a unit restricted to supervisory and administrative personnel. The New York law is the only other scheme that has provided the criteria necessary to meet teacher unit determination problems.[23]

Once a statute has dealt with unit determination, it must provide a means by which the employees in a unit will chose organizations to represent them. Again utilizing procedures developed for employees in the private sector the schemes have embraced the representation election as the most useful means of determining employee choice when a dispute exists.[24] Indeed, in the case of some of the statutes dealing with teachers, an election must be held whether there is a dispute over representation or not.[25] Alternative methods of ascertaining employee choice of the bargaining agent, such as union card checks, inspections of union membership rolls, or counting dues deduction authorizations, are not often sanctioned by the statutes.[26] The same agencies designated to make unit determinations also administer the election procedures, and in some cases, this means that local authorities oversee the elections.[27] All the procedures must be initiated by petition from an employee organization seeking to establish representation,[28] and some schemes[29] have provided that the public employers can also petition the administering agency asking that elections be conducted, if they are unable to ascertain which of two or more competing groups they should recognize.

After an employee organization has been chosen, the problem becomes one of what type of recognition status, if any, should be granted. Private sector rules almost always specify that the employee organization receiving a majority of the unit's votes in a representation election shall be the "exclusive representative" of all the employees in the unit. While requiring that the organization represent the interests of all the employees without discrimination against non-union members, this type of recognition also prevents employer dealings with other organizations which seek to undermine the bargaining position of the majority organization. Although this result helps establish stability in bargaining relationships some feel that forcing the minority to accept the majority representative may present Constitutional difficulties.[30] This presumed problem may be the reason why some public employee statutes provide for members-only representation[31] or proportional representation.[32]

Under proportional representation schemes, negotiating councils are established, with each employee organization or representative afforded membership on the council in proportion to the number of unit employees belonging to that organization. The weakness of this arrangement can be that it transfers to the bargaining table all the animosity existing between contending organizations which could have been resolved in the representation election. Also, the grievance procedure under such a system may invite aggrieved employees to search for the organization willing to take the strongest anti-administration posture. Public administrators at the bargaining table may be confronted with organizations competing with each other to find the most negative approach in calling policies to account.

The Taylor Law in New York has authorized the grant of exclusive representation for the time being, but has directed that a thorough study of the matter be undertaken.[33] Perhaps the undemocratic features of exclusive representation can be softened by granting minority organizations dues checkoff rights or the right to make independent petitions during negotiations without the right to effect a settlement.[34] Adequate protection for the minority can also be assured by establishing decertification procedures under which exclusive representation can be withdrawn and by providing that elections be held frequently enough to prevent organizations from becoming too firmly established and insensitive to minority views.

D. Regularization of the Negotiation Process

A policy geared to establishing collective bargaining in the public service must confront one problem for which there is no parallel in private sector labor relations—a budget adoption or submission. Most governmental agencies must finalize and adopt or submit budgets at a designated time during the year in order to receive an appropriation (or exercise taxing power) for the next fiscal year. If collective negotiations is to afford public employees participation in the determination of their working conditions, then ideally contract negotiations should be completed before the date for final adoption or submission of budgets. Engaging in collective bargaining after funds have already been allocated to budgets which did not request money to implement negotiations results may only cause significant dispute over whether the appropriated funds can be diverted to finance union demands. Ideally, bargaining should be so related to the budget making process that its results can be incorporated into the budget to be requested or adopted.

There are three components to this problem. The first involves defining the scope of bargainable issues in relation to the budget. The second component is concerned with the timing of the representation election procedures so that they will not disrupt negotiations taking place near budget submission dates. The third deals with the actual statutory directions to the parties concerning the timing of negotiations and the presentation of bargaining results to the legislature.

Statutory provisions defining the scope of bargainable issues should provide guidance for determining the extent to which the governmental power to determine public employee working conditions is to be subjected to the bilateralism of negotiations. Carefully drawn provisions of this sort would seem to be essential for any scheme attempting to institute collective bargaining in a system that has traditionally prohibited the "sharing" of governmental functions. Most of the schemes have transferred the private sector formula of "wages, hours, and working conditions" to define the scope of bargainable issues in the public service, adding only a provision which excludes civil service rules from joint determination.[35] This type of formula, though, has had its problems in resolving hard questions of "management rights" in the private sector, and is not likely to be helpful when negotiations stall because a public employer refuses to discuss matters it considers as lying solely within the government's prerogative. Interestingly enough, some of the schemes enacted specifically for teachers have attempted to establish new concepts in the bargainable subject matter area in the face of teacher organization demands for a voice in the determination of educational policy.[36]

Because the filing of representation election petitions and the ensuing investigations and voting activity disrupt the relationship between established employee organizations and employers, some means by which that sort of activity is prohibited near bargaining deadlines should be established in order to assure that the collective bargaining process can be completed. Ideally, if all collective bargaining were finished before the deadline for the budget submission or adoption, it would be a simple matter to prohibit all election activity for a specified period before that date. The Taylor Law[37] has done just that, and Massachusetts Act for municipal employees has achieved the same result by a roundabout process.[38] While some of the other schemes provide election and contract bars to further election activity, they fail to relate those procedures to the budget submission date.[39]

While the schemes generally fail to adequately relate the bargaining process to budget making, some states have attempted to force settlements before the budget is submitted. The Rhode Island laws,[40] for example, require that union monetary demands be submitted to public employers 120 days before the submission of budgets. Four[41] of the other statutes provide that their impasse procedures are to be utilized if agreements have not been reached within a certain time before budget dates in the hope that the parties themselves can reach settlements in time to incorporate them into the budget submissions.

Often, public employer bargaining representatives do not have final authority to obligate governmental units by contract. Even if bargaining were sufficiently related to the budget making process, there would still be the problem of getting the bargaining results implemented if the employer representative lacked the necessary authority. Very few schemes have recognized that a failure to provide for this contingency can discredit the bargaining process and lead to unnecessary conflict when a tentative settlement is repudiated on the ground that the employer representative lacked authority.[42] The Massachusetts municipal employee law[43] has a unique provision reinforcing the authority of school boards which specifies that when funds are needed for the implementation of a consummated agreement with teachers, ten or more inhabitants of the city or town may petition the state court to determine the amount of funds needed and that court may order the city to provide a sum equal to the deficiency plus an additional 25 percent to meet appropriations for the next school year. All that may be necessary is for a statute to provide for a joint employer-union submission of a settlement to the legislature with directions for continued bargaining if the legislature rejects the proposal. The general failure of the schemes to recognize this problem, and the other considerations leading to a regularization of the negotiation process, seems unfortunate.

E. Unfair Labor Practices

Although unfair labor practice procedures to police employer and employee organization conduct during union organizational campaigns, representative elections, negotiations, and grievance handling are widely utilized in private sector labor relations, only a few of the schemes for public service employees have enacted statutory mechanisms to insure fair play in the conduct of collective bargaining relationships.[44] Part of this problem was underscored earlier in the discussion of the general failure to provide statutory enforcement for the good faith bargaining mandate.[45] Here, the public service schemes might profit from the experience in the private sector. Those provisions establishing centralized authorities with the power to issue cease and desist orders against parties charged with unfair practices and the right to petition the courts for enforcement of those orders if they are disobeyed could easily be transferred.[46] Moreover, the private sector rules prohibiting employer and employee organization interference with representation elections, employer interference with the formation of employee organizations, and employee organization coercion of employers and employees in the selection of the bargaining representative might be of benefit. While few statutes have chosen this response,[47] all do provide that no employee can be coerced in the exercise of rights created by the acts. The problem is that no statutory mechanism exists in the majority of schemes to insure rapid and fair enforcement of those provisions. It is interesting to note that the Taylor Law has no unfair labor practice procedure, unless the provision empowering the Public Employee Relations Board to make such rules and regulations as it deems necessary will be interpreted to allow that body to set up its own procedure.[48]

F. The No-Strike Policy and Its Enforcement

Although public employee organizations argue that denial of the right to strike seriously emasculates any attempt to create a collective bargaining system, the states have elected to support a policy assuring that governmental decision making will not be influenced by the unfettered use of economic power by prohibiting the right to strike. Most of the states have failed, however, to achieve the full force of such a policy because their statutes fail to provide for the use of sanctions if the strike prohibition is ignored.[49] Of those schemes that do have sanctions to enforce their no-strike policies, the rules center on penalizing individual strikers by specifying some sort of discipline,[50] providing for dismissal,[51] setting up special damages to be paid on the failure to abide by court injunctions against strikes,[52] refusing to allow pay increases to take effect after a strike,[53] and by providing for civil service probation or the withdrawal of teaching certificates in the event of a strike.[54] These provisions have been rarely invoked, however, either because the unions are successful in exacting some sort of promise not to invoke the penalties from the public employers as a part of negotiated settlements or because the public employers voluntarily elect not to prosecute.[55] Instead of attempting to enforce these sanctions against all public employee groups, suggestions have been made to the effect that the penalties be imposed only if the strike disrupts an "essential" public service. But this approach has been rejected because of the immense difficulties in determining which services are essential,[56] and because the unions can still render penalties ineffective by forcing public employers to agree not to prosecute.

Recognizing that strike sanctions geared to punishing individuals may be ineffective when it is the union organizations themselves that may be ultimately responsible for strike activity, the Taylor Law enforces its no-strike policy by mainly penalizing employee organizations, conditioning the granting of exclusive recognition on a pledge that the organization does not assert the right to strike,[57] providing that dues checkoff rights can be revoked by the Public Employee Relations Board for a period not to exceed eighteen months if a strike occurs,[58] specifying monetary penalties to be exacted from employee organizations and individuals disobeying court orders prohibiting threatened strikes or enjoining existing strikes,[59] and by requiring that the chief legal officers of governmental units threatened with strikes institute court proceedings under the Act.[60] The Massachusetts[61] and Wisconsin[62] state employee programs attempt to achieve the same result by providing that employee organizations will be guilty of an unfair labor practice if they strike.

G. Impasse Procedures

Either because civil service systems have provided for grievance procedures or because the use of such mechanisms is so widely accepted that there is no need for statutes to create them, only a minority[63] of the state schemes have found it necessary to require rules for the resolution of disputes over public employee grievances. The creation of tripartite fact finding panels to recommend settlements has been the solution adopted by most of these schemes,[64] but two[65] have provided for procedures utilizing three stages which resemble the grievance procedures maintained in the private sector, though only the Massachusetts scheme for state employees has a terminal stage specifying arbitration.

Because the right to strike has been used in private sector collective bargaining to assure employee organizations the power necessary to require employers to submit to bilateral determinations of working conditions and since that right has not been granted to public employees, the states have begun to search for alternatives that will afford public employee organizations the power needed to force public employers to bargain. Compulsory arbitration has been generally rejected as a mechanism for the resolution of impasses in negotiations without resort to the strike. There are two probable reasons for this. The first stems from the notion that public employers cannot delegate to third parties the responsibility for making binding decisions for the agency on basic terms and conditions of employment. Second, compulsory arbitration as an alternative to the strike has traditionally been held to prevent and frustrate the normal bargaining process; knowing arbitration is inevitable, the parties refuse to "move" or compromise in negotiations, assuming that the arbitrator will tend to "split the difference" between the "final" positions of the parties just prior to arbitration. When compulsory arbitration has been adopted, it has usually been limited to the settlement of issues "not involving the expenditure of money,"[66] although the Wyoming[67] law governing fire-fighter labor relations does utilize it for all unresolved issues.

A voluntary agreement between the parties to utilize arbitration to settle a particular impasse or some part of it might not present the same problems with respect to destruction of the normal bargaining process as utilization of compulsory arbitration. Because the decision to utilize the mechanism itself is the product of mutual agreement, the procedure could be varied to meet the exigencies of the situation. The advantage to voluntary arbitration might be that by agreement, the parties could on a case by case basis vary such important criteria as the precise subject to be arbitrated, the scope and effect of the arbitration award and the method of selecting the arbitrator. However, very few procedures[68] allow for voluntary arbitration as an alternative to the strike in resolving bargaining impasses. And, of course, it is difficult to say, were voluntary arbitration to be made available to the parties by statute, how often the procedure would be utilized. Frequently, employee organizations might feel that they could get more by striking than by arbitrating, and employers might not wish to grant any discretion to third parties.

The intervention of the third party as mediator sent by a state mediation service or selected by the parties as a supplement to collective bargaining has been used by many of the schemes.[69] Mediation, though, has rarely been considered as an adequate alternative to the strike.

The most popular of the procedures recommended as alternatives to the strike by the public employees is fact-finding with recommendations, or, as sometimes named, advisory arbitration. Its supporters argue that it provides a means to settlement by injecting expert help into the joint consultations to narrow the issues and project specific solutions. The finding of facts should, ideally, destroy the possible superficial validity of any outrageous demands made by the parties which might be holding up a settlement. The recommendations for settlement of the dispute when published are thought to influence governmental decision making through the political process. Ideally, the recommendations are expected to mould public opinion and utilize the political pressure that form around that opinion to force the parties toward a settlement. In theory, if the recommendations favor the position of one party, then the cost of disagreement with that position is increased to the other party as public opinion embraces the recommendations. A public employer who refuses to accept a settlement based on the fact finders' recommendations will, in theory, ultimately, if disruption of services is threatened or results, face political reprisal at the polls.

Whether or not fact finding with recommendations will be a workable alternative to the strike in public employment is as yet an open question.[70] Certainly a valid argument can be made casting doubt on the theory's assumption that public opinion can be moulded speedily enough to forcefully influence short term governmental decisions. An equally serious question can be raised as to whether it is realistic to assume that employee organizations will often need to be responsive to whatever "public opinion" might coalesce around a fact-finder's proposals. Aside from these difficulties, some of the operational aspects of the scheme may prove troublesome.

The statutory schemes utilizing fact-finding have generally provided for selection of the fact finders in three ways: a panel of three persons with one member chosen by each party to the dispute, and the third member selected by the two members representing the parties;[71] a single fact finder chosen by mutual agreement from a list submitted by a state agency;[72] a panel of three disinterested persons appointed by a neutral authority.[73] The first method is thought to be superior to the other two because it specifies that a representative of each party will have something to say in the finalization of the recommendations. Since most of these procedures neither preclude the panels from engaging in mediation nor specifically authorize them to do so, this scheme can also be used to implement tripartite mediation and intra-panel bargaining during the negotiating sessions, both of which can be instrumental in achieving settlements.

All of the procedures are organized so that the fact finders hold hearings on the dispute for a period of time (during which any mediation efforts will take place) and then issue the recommendations within a certain time after the hearings end. Some of the schemes have forged a close relationship between the issuance of recommendations and the budget submission date.[74] These attempts to rigidly structure the fact finding procedure may constitute a weakness, though, especially when such structuring is coupled with a mechanism that gives the parties no voice in the selection of fact finders.[75] Such rigidity may require the fact finders to formalize a position through the issuance of recommendations before a dispute has reached its critical stage, which may antagonize the parties and thereby destroy any of the positive results produced by mediatory efforts made up to that point, and force rejection of the fact finding recommendations. If such recommendations were issued by a panel in which the parties were not adequately represented, the problem might be compounded.

While a few[76] of the procedures give the fact finders statutory directions on what criteria are to be considered in arriving at recommendations, most fail to provide any guidance. Although some require the party who bargains in bad faith to pay the whole cost of the fact finding procedure,[77] most schemes[78] provide that the parties share the costs of fact finding equally.

The Taylor Law[79] authorizes two additional stages if the parties fail to accept the fact finders' recommendations: the Public Employee Relations Board can make additional recommendations for settlement, and either party can formally submit a copy of the recommendations to the appropriate legislative body. Presumably, this last stage is a means of placing the whole dispute into the hands of the legislators for resolution. Whether a legislature can be an effective dispute settlement mechanism remains to be seen.

H. Administrative Machinery

While the statutes have utilized various types of administrative machinery,[80] most often existing agencies have been used to deal with public employee labor relations. It has been theorized that the existing state agencies are more likely to be given jurisdiction over public employee labor relations if the particular state policy emphasized the similarities rather than the differences between public and private sector employees and if the following operational conditions are met: the exclusion of state civil service employees and teachers from the jurisdiction of the existing state agencies, since both groups have powerful professional organizations which object to the use of traditional labor relations mechanisms; the support of the state labor agencies by the trade union movement; the support of an expansion of jurisdiction by the state agencies themselves; and the absence of established urban public employee relations programs that might block state threats to their autonomy.[81]

For instance, the policy of the Taylor Law has emphasized the differences between public and private sector employees and New York State has not met all of the operational conditions for the extension of state agency jurisdiction. The creation of the Public Employee Relations Board[82] to be exclusively concerned with labor relations in the public service was the result. Not only is this Board empowered to administer a labor relations system for public servants, but it is also directed to make studies of controversial issues raised by the new system and to make statistics and other data on wages, hours, and working conditions in private and public employment available to the parties and mediators.

FOOTNOTES

1. 5.4 million people were employed by the various levels of government in 1945, while well over 11.5 million worked for government units in 1967. One of every six nonagricultural wage and salary employees was on the public payroll in 1967. U. S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, EMPLOYMENT AND EARNINGS AND MONTHLY REPORT ON THE LABOR FORCE, Vol. 14, No. 1, Table B-1. (1967).

2. 6.5 million workers were employed by local government in 1967, while state governments employed 2.3 million and the federal government provided employment for 2.7 million. In 1966, 76.1 percent of all public employees were employed by state and local governments. Since 1956, state and local government employment has increased by 63 percent and is expected to increase by 66 percent in the next decade to account for 80 percent of all government employment. 90 MONTHLY LABOR REV. 13, Table A-9 (1967), 85 MONTHLY LABOR REV. 285 (1965).

3. In the period from 1956-1964, there was a 60 percent increase in the number of public employees who belonged to trade unions, with 40 percent of that increase occurring between 1962 and 1964. During this period, the proportion of unionized workers in the entire labor force dropped from 25 percent to 22 percent, while the percentage of unionized government employees rose from 12 percent to 22 percent. STEIBER, *Collective Bargaining in the Public Sector*, in CHALLENGES TO COLLECTIVE BARGAINING 66-67 (L. Ulman, ed. 1967). Important as the union organizations have become, the dominant force among public employees remains in the independent association. Partly because many public employees have achieved some professional status for which traditional trade unionism has had no appeal and partly because civil service systems, under which most public employees work, provide considerable job security and furnish mechanisms to deal with grievance disputes, these associations have maintained huge memberships. While these organizations have eschewed traditional trade union tactics in the past, the National Education Association, most important of the independent associations, has, of course, now departed almost completely from its historic disdain for "unprofessional behavior" by recently recognizing the possibly legitimate use of the strike and by authorizing the national office to provide striking local organizations with funds, legal advice, and staff. *N. Y. Times*, July 8, 1967, at 10, col. 6 (city ed.).

4. There were 42 strikes by public employees in 1965 compared with 142 in 1966. N. Y. Times, Aug. 30, 1967, at 16, col. 1. Between 1942 and 1961, 743 strikes were called against public employers, involving some 156,000 workers and resulting in 1,080,000 man-days of idleness. BAUMIN, Strikes of Government Employees, 1942-1961 86 MONTHLY LABOR REV. 52, 53 (1963). Recently, strikes among teachers have shown a dramatic increase. In 1966, 37,400 teachers struck for a total of 68,000 man-days. See, GLASS, Work Stoppages and Teachers: History and Prospects, 90 MONTHLY LABOR REV. 43 (1967).

5. For the purposes of the present discussion, public employees can be divided into four groups: those employed by the state or a municipality; the employees of legislatively created semi-autonomous agencies of the state, such as school boards; those serving in a local public industry, such as the employees of a hospital; and those employed by privately owned public utilities. This review and analysis will consider only the mechanisms developed to deal with labor relations problems among employees in the first two groups.

6. Twenty-three states have passed legislation: Alaska, California, Connecticut, Delaware, Florida, Illinois, Maine, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin. Three states have established rules by attorney general opinion: Colorado, Indiana, and Utah. A total of six states have legislation prohibiting public employees from organizing and entering into collective bargaining agreements: Alabama, Arkansas, Georgia (prohibition applies only to the police), Louisiana, North Carolina, and Texas. Three states accomplish the same result by attorney general opinion: Kentucky, New Mexico, and Nevada. Virginia, Ohio, and Hawaii have legislation dealing only with the prohibition of the right to strike among public employees and the sanctions to be imposed if the prohibition is violated. One state, Iowa, hovers in ambiguity by having established a scheme for creating arbitration panels to resolve bargaining impasses between firemen and local government units, but by attorney general opinion refusing to give collectively bargained agreements any legal status.

7. Seven states have responded in this fashion: ALASKA STAT. ANN. Sec. 23.40.10 (1962); FLA. STAT. ANN. Sec. 839.221 (1965); MICH. STAT. ANN. Sec. 17-455(2) (1960), as amended (Supp. 1965); N.J. CONST. art. 1, Sec. 19; N. Y. CIV. SERV. LAW, Sec. 201 (8) (McKinney Supp. 1967); N.D. CENT. CODE, sec. 34-11-01 (1960); PA. STAT. ANN. tit. 43, Sec. 215.1 (Purdon 1964).

8. CAL. GOV'T CODE ANN. Sec. 3501 (c) (West 1967) and CAL. EDUC. CODE ANN. Sec. 13081(c) (West 1967); MINN. STAT. ANN. Sec. 179.51 (1966) and MINN. STAT. ANN. Sec. 125.19 (Supp. 1967); ORE. REV. STAT. Sec. 243.710 (1965) and ORE. REV. STAT. Sec. 342.450 (1965). NEB. REV. STAT. Sec. 48-801 (1960) as amended (Supp. 1967) and NEB. LAWS, Ch. 518, Sec.

2 (1967). In general, a total of sixteen states have legislation which attempts to deal with collective bargaining among teachers, seven states (California, Connecticut, Minnesota, Nebraska, Oregon, Rhode Island, and Washington) having adopted special legislation for the purpose, nine states having included teachers within the coverage of their legislation dealing with public employees in general, *supra* note 7, and *infra* note 9.

9. MASS. ANN. LAWS. Sec. 149:178G (Supp. 1967) and MASS. ANN. LAWS Sec. 149:178F (Supp. 1967); WISC. STAT. ANN. Sec. 111.70(1) (West Supp. 1967) and WISC. STAT. ANN. Sec. 111.80 (West Supp. 1967). DEL. CODE ANN. tit. 19, Sec. 1301 (Supp. 1966), covers municipal and state employees under one scheme but excludes teachers.

10. CONN. GEN. STAT. ANN. Sec. 7-467 (1965) as amended (Supp. 1967) and CONN. GEN. STAT. ANN. Sec. 10-153a (1967); Extraordinary Session Laws of Washington, Ch. 108, Sec. 1 (1967) and WASH. REV. CODE Sec. 28.72.010 (Supp. 1965). Three statutes--MO. ANN. STAT. Sec. 105.500 (1966) as amended (Supp. 1967); N. H. REV. STAT. Ch. 31, Sec. 3 (Supp. 1965); and VT. STAT. ANN. tit. 21, Sec. 1701 (Supp. 1967)--have schemes covering municipal employees and excluding teachers but have no legislation attempting to deal with teachers. Rhode Island has enacted five separate schemes, one each for teachers, firemen, policemen, municipal employees, and state employees. R.I. GEN. LAWS Sec. 28-9.3, Sec. 28-9.2, Sec. 28-9.1, Sec. 28-9.4 and Sec. 36-11. (Supp. 1966).

11. ALA. CODE tit. - Sec. - (4 BNA LAB. REL. REP. Sec. 10: 202, [1967]). FLORIDA STAT. ANN., Sec. - (4 BNA LABOR REL. REP. Sec. 19:225, [1967]). ILL. STAT. ANN. Ch. 24, Sec. 10-3-8 (Smith-Hurd 1962); IOWA CODE ANN. Sec. 90.15 (Supp. 1966); ME. REV. STAT. Ch. 26, Sec. 980 (Supp. 1966); R; I. GEN. LAWS, Sec. 28-9.1-1 (Supp. 1966); and WYO. STAT. ANN., Sec. 27-265 (Supp. 1965). CAL. LABOR CODE Sec. 1960-1963 (West 1960).

12. The Iowa and Illinois Firemen's dispute resolution procedures make no mention of any of the bargaining rights, IOWA CODE ANN. Sec. 90.15-90.27 (Supp. 1966) ILL. STAT. ANN. Ch. 24, Sec. 10-3-8 -10-3-12 (Smith-Hurd 1962). The Nebraska statute extending the jurisdiction of the Court of Industrial Relations to public employee disputes affords no bargaining rights to public employees. NEB. REV. STAT. Sec. 48-801 - 48-823 (1960) as amended (Supp. 1967). The Nebraska Teachers Act, Neb. Laws, Ch. 518, Secs. 4, 7 (1967), while allowing teachers the right to organize, provides that no board of education shall be required to meet or confer with a teacher organization unless a majority of the board determines that the organization be recognized. If the boards do choose to bargain, they can decide which issues will be discussed or which issues bargained will be in good faith. Pennsylvania, while providing an elaborate grievance procedure for its government employees, has failed to explicitly grant the rights associated with

collective bargaining. PA. STAT. ANN. tit. 43, Sec. 215.1 - 215.5 (Purdon 1964) also fails to create any bargaining rights.

13. E. g., ALASKA STAT. ANN. sec. 23.40.010 (1962) provides that only that state and political subdivisions may enter into collective bargaining agreements with labor organizations. In New Hampshire, towns are only authorized to recognize employee organizations and to enter into collective bargaining agreements with them, N. H. REV. STAT. Ch. 31, Sec. 3 (Supp. 1965). The Wisconsin Municipal Employee Act, WISC. STAT. ANN. Sec. 111.70(2) and Sec. 111.70(4)(e)(2) (West Supp. 1967), grants municipal employees the rights of organization and representation, but has no specific provision requiring the municipal employer to bargain in good faith even though the fact finding impasse procedure can be initiated when either party fails to bargain in good faith and agreements are to be reduced to writing. The Wisconsin Employment Relations Board has held that the Act was not intended to mandate a good faith bargaining requirement. City of New Berlin, 61 LRRM 1487 (1966). The Indiana Attorney General has ruled, OP. ATT'Y GEN. 22 (1966), that the declared public policy favoring collective bargaining is not limited to employees in private industry, and that unless otherwise forbidden by statute, state and local public officials are authorized to consult with representatives of employees concerning wages, hours, and working conditions. The North Dakota Attorney General has held, OP. ATT'Y GEN. 71 (1956) that the dispute machinery established to resolve differences between public employees and their employers was set up to encourage, but not require, collective bargaining between political subdivisions and unions. The Utah Attorney General has ruled, CCH LAB. LAW RPT., 2 State Laws Utah, Sec. 47, 008.80 (1945), that public bodies may not be compelled to bargain but may do so voluntarily so long as they do not barter or assign away any governmental powers.

14. The Alabama Firefighters Act, assures the rights of self-organization and freedom of association and allows employee organizations that do not assert the right to strike to present proposals for bargaining to city authorities. The Minnesota Teachers Act, MINN. STAT. ANN., Sec. 125.19 (Supp. 1967), espousing a policy of closer cooperation between school boards and certificated school personnel, grants the right of organization and requires boards to meet, but without enforcement procedures. The Missouri statute, MO. ANN. STAT. Sec. 105.510 - 105.40 (1966) as amended (Supp. 1967) permits public employees to join organizations of their choice, authorizes public employers to negotiate with those organizations, and permits the reduction of agreements to writing, but provides for no specific enforcement procedure. The Oregon Teachers Act, ORE. REV. STAT. Sec. 342.450 - 352.470 (1965) grants teachers the right of self-organization and the "right" to bargain. California firefighters have the rights of self-organization and right to "discuss" working conditions, CAL. LABOR CODE Sec. 1962 (1960). The California Teachers Act, CAL. EDUC. CODE ANN. Sec. 13083 (West Supp. 1966) guarantees the right of organization and representation and allows for "meet-

ing and conferring" but makes no provision for enforcement of those obligations. The Washington Teachers have the right to join employee organizations and to meet with boards of directors of school districts but again, no enforcement procedures are provided. WASH. REV. CODE, Sec. 28-72.-030 (Supp. 1965). In California, public employees generally are granted the right to form, join, and participate in labor organizations; employee organizations have the right to represent their members in employment matters with public agencies, while agency heads are directed to meet with representatives of employee organizations upon request and to consider as fully as they deem reasonable any requests presented. CAL. GOV'T CODE ANN. Secs. 3502, 3503, 3505, 3506. (West Supp. 1966). The Connecticut Teachers Act, CON. GEN. STAT. ANN. Secs. 10-153a, 10-153d (Supp. 1967) grants teachers the right to organize, and imposes a duty to bargain upon both parties including the reduction of agreements reached to writing. The Delaware statute, DEL. CODE ANN., tit. 19, Sec. 1301-1303 (Supp. 1966), protects the employees' right to organization, grants public employers authority to enter into collective bargaining agreements, and mandates that both sides bargain in good faith. The Florida Firefighters Act, FLA. STAT. ANN. Sec. (4 LAB. REL. REP. Sec. 19:225, [1967]), applies only to counties of less than 390,000 people, but guarantees the rights of organization and representation, provides that public authorities recognize firemen's organizations, obligates both sides to bargain in good faith, and requires the execution of written agreements. The Maine and Wyoming Firefighter Laws have similar provisions. ME. REV. STAT. tit. 26, Secs. 983, 992 (Supp. 1966); WYO. STAT. ANN. Sec. 27-266, 27-268 (Supp. 1965). The Minnesota program for public employees generally recognizes the right to organize and directs government agencies and employee organizations to enter into discussions with an affirmative willingness to resolve grievances and with a mutual obligation to bargain in good faith. "Formal" recognition is authorized for employee organizations having a majority of the employees in a unit as members, while "informal" recognition can be granted to any employee organization. The Labor Commissioner can be petitioned by either party for the establishment of a tripartite fact finding panel if good faith bargaining does not occur, but either party can divest that panel of authority and demand that the government agency involved establish its own tripartite panel, taking power from the independent enforcement mechanism. MINN. STAT. ANN. Secs. 179.50, 179.52(2), 179.52(3), 179.521, 179.53. (1966). The New York Statute, N. Y. CIV. SERV. LAW, Secs. 200, 203, 204(1), 204(2), 207(3)(b) (McKinney Supp. 1967), grants public employees the rights of organization and representation, provides that recognition be afforded to employee organizations which do not assert the right to strike, mandates that both sides bargain in good faith on contract terms and administration of grievances, and requires that agreements be reduced to writing. There is, however, no enforcement mechanism.

Presumably, statutes which provide public employees with the right to negotiate or confer with the public employer, but are silent on enforcement procedures, would be subject to enforcement through the courts should the need arise.

15. The following state laws grant many of the rights associated with private sector collective bargaining to public employees and their organizations (the right to strike, of course, excluded), mandate the good faith bargain, and have established procedures whereby complaints about bad faith bargaining can be raised under an unfair labor practice procedure in which a centralized agency such as a state labor relations board has the power to issue a cease and desist order enforceable in the courts against the offending party or to establish a tripartite fact finding panel to consider alleged "bad faith" in making recommendations for the settlement of the dispute. CONN. GEN. STAT. ANN. Secs. 7-468(a), 7-469, 7-470(c), 7-741 (3)(b) (Supp. 1967) and MASS. ANN. LAWS Secs. 149:178D, 149:178H(1), 149:178L (Supp. 1967) (Municipal employees) have procedures under which fact finding boards are created in bad faith situations. Michigan, MICH. STAT. ANN. Sec. 17:455(9), 17:455(15), 17:455(10),(Supp. 1965), all the Rhode Island Acts, R. I. GEN. LAWS Secs. 28-9.1-4 - 28-9.1-7, 28-9.2-4 - 28-9.2-7, 28-9.3-4 - 28-9.3-7, 28-9.4-4 - 28-9.4-7, 36-11-1(c), 36-11-3, 36-11-6, Vermont, VT. STAT. ANN. tit. 21, Sec. 1703 (Supp. 1967), the Wisconsin State Employee Program, WISC. STAT. ANN. Secs. 111.82, 111.84(d) (West Supp. 1967) and the Massachusetts state employee program MASS. ANN. LAWS Sec. 149:178F (10) (Supp. 1967) all specify unfair labor practice procedures to enforce the good faith bargaining mandate.

16. In fact, only twelve states have provisions dealing with the determination of bargaining units. CONN. GEN. STAT. ANN. Sec. 7-471 (Supp. 1967); DEL. CODE ANN. tit. 19, Sec. 1304 (Supp. 1966); MASS. ANN. LAWS Sec. 149:178(F)(3) and Sec. 149:178H (Supp. 1967); MINN. STAT. ANN. Sec. 179.52(4) (1966); MICH. STAT. ANN. Sec. 17:455(13) (Supp. 1965); MO. ANN. STAT. Sec. 105.500(3) (Supp. 1967); N. Y. CIV. SERV. LAW, Sec. 207 (1) (McKinney Supp. 1967); OREGON CIVIL SERVICE RULE ON COLLECTIVE BARGAINING (State Employees), Secs. 98-100, 98-200, 98-400 (1966). R. I. GEN. LAWS Sec. 28-9.4-6 (Supp. 1967); Washington Extraordinary Session Laws, Ch. 108, Sec. 6 (1967); WISC. STAT. ANN. Sec. 111.70(4)(d) (West Supp. 1967); WISC. STAT. ANN. Sec. 111.81 and 111.83 (West Supp. 1967); VT. STAT. ANN. tit. 21, Sec. 1703 (Supp. 1967). Both the California Teachers Statute, CAL. EDUC. CODE ANN. Sec. 13085 (West Supp. 1966), and the Minnesota Teachers Statute, MINN. STAT. ANN. Sec. 125.22 (3) (Supp. 1967) deal with the issue of unit by providing for proportional representation of all teacher and administrator organizations on a negotiating council. The Oregon Teachers Statute, ORE. REV. STAT. Sec. 342.460 (1965) achieves somewhat the same result by providing that the bargaining agent shall consist of a council of employee representatives elected at large. The Connecticut Teachers Statute, however, CONN. GEN. STAT. ANN. Sec. 10-153(b)(b) (1967) provides for the creation of three possible types of bargaining units among teachers and administrators.

17. *Supra*, n. 16 for citations. Connecticut, Rhode Island, and Vermont designate their State Labor Relations Boards to oversee unit determinations.

Michigan, and Missouri designate their state Labor Mediation Boards. For municipal employees, the Massachusetts State Labor Commissioner has administrative responsibility for unit determinations, while the director of personnel and standardization has such responsibility for Massachusetts state employees. In Minnesota, the Labor Commissioner has the responsibility for overseeing unit determinations. The Wisconsin Employment Relations Board has responsibility for unit determinations. In Washington, it is the Department of Labor and Industries. Two schemes have provided that local administration can oversee unit determination. The Connecticut Teachers Statute, CONN. GEN. STAT. ANN. Secs. 10-153(b)(b) and 10-153c requires that representation elections through which the unit determinations are made be administered by impartial persons or agencies mutually selected by the parties on a case by case basis. In New York, local government agencies are empowered to establish procedures which conform to those specified in the law itself and the statutory mechanisms are utilized by the Public Employment Relations Board if a local agency has established a nonconforming procedure or lacks one altogether. N.Y. CIV. SERV. LAW, Secs. 205(5)(c), 206, 212 (McKinney Supp. 1967). The Oregon unit determination rules for state employees vest administrative power in each appointing authority allowing a right of appeal to the civil service commission if a party is dissatisfied with a unit determination. OREGON CIVIL SERVICE ON COLLECTIVE BARGAINING, Secs. 98-300(6) and 98-400(2) (1966).

18. Generally the rules transferred from the private sector experience provide that in the case of a representation dispute the administering agency upon petition by either party will determine the appropriate unit by considering the duties, skills, and working conditions of the employees, the history of bargaining between the employees and the public employer, the extent of union organization among the employees, and the desires of the employees themselves. These schemes provide for the automatic exclusion of supervisors and professionals from the units in specifying that appropriate units shall consist of the employees of one public employer in one governmental unit, appointing authority, occupational grouping or craft. In none of these schemes is there an attempt to provide the administering agency with criteria defining "professional employees" or "supervisors." Statutes with rules of this nature follow: DEL. CODE ANN. tit. 19, Sec. 1304 (Supp. 1966) (professional employees can be included in a unit if they vote in a separate election for inclusion); MASS. ANN. LAWS Sec. 149: 178H(4) (Supp. 1967) (professional employees in the municipal service can vote to include themselves); MICH. STAT. ANN., Sec. 17:455(13) (Supp. 1966) (no person in an administrative position inferior to a fire commissioner is to be considered a supervisor); OREGON CIVIL SERVICE RULE ON COLLECTIVE BARGAINING, Sec. 98-100(2) (1966) (applies to state employees only); R. I. GEN. LAWS, Sec. 28-9.4-6 (Supp. 1967); VT. STAT. ANN. tit. 21, Sec. 1703 (Supp. 1967) (professional employees can vote to include themselves in a special election); Wash. Extraordinary Session Laws, Ch. 108, Sec. 6 (1967); WISC. STAT. ANN. Sec. 111.70(4)(d) (West

Supp. 1967). Some schemes have attempted to define precisely what types of employees are "professionals" and excludable from bargaining units unless they vote in special elections for inclusion. But, again, the private sector rules have merely been transferred. Hence, professional employees are defined to be those who do work predominantly intellectual in character, work which involves the exercise of discretion and judgment the output of which cannot be measured by standardized methods, work which requires advanced knowledge in a field of specialized intellectual endeavor; or a person who has completed courses of specialized instruction and is performing work under the supervision of a professional. CONN. GEN. STAT. ANN. Sec. 7-471(2) - 7-471(3) (Supp. 1967); WISC. STAT. ANN. Sec. 111.81(2) - 111.81(3) (West Supp. 1967). This scheme for state employees provides that the WERB may, if it wishes, conduct a special referendum among employees involved to ascertain their wishes concerning the definition of the appropriate unit.

19. The classic statement of this criterion is found in NEW YORK, GOVERNOR'S COMMITTEE ON PUBLIC EMPLOYEE RELATIONS REPORT, 21-28 (1966).

20. Three statutes have met the problem of the supervisor head-on. In considering whether supervisors are to be excluded from units, the Connecticut statute directs that the Connecticut State Labor Relations Board must find that two or more of the following criteria are applicable to a job: (1) the performance of such management control duties as scheduling and overseeing subordinates; (2) the performance of distinct and dissimilar duties from those of employees supervised; (3) the exercise of judgment in adjusting grievances and applying personnel policies; and (4) the establishment or participation in establishment of performance standards. CONN. GEN. STAT. ANN. Sec. 7-471(2) - 7-471(3) (Supp. 1967). In New York, the appropriate unit shall conform to the community of interest among the employees involved; the unit shall be so established so that government officials at the level of the unit will have the power to consummate agreements with employee organizations or to make effective recommendations to other authorities concerning the issues negotiated; the unit must be compatible with the joint responsibilities of the public employer and the employees. N.Y. CITY SERV. LAW, Secs. 207(1)(a), 207(1)(b), 207(1)(c) (McKinney Supp. 1967). The Labor Conciliator in Minnesota in determining appropriate units is to take into account the principles of efficient administration of government, the principles and coverage of the uniform position classification, comprehensive plans for the future development of the government agency, the history and extent of organization within the government unit, the delineation of administrative and supervisory levels of authority, the geographical location of workers, and the recommendation of the parties. MINN. STAT. ANN. Sec. 179.52(4) (Supp. 1967). The Missouri scheme directs that the community of interest among public employees is to be considered in determining

units, but gives no criteria for identifying that factor. MO. ANN. STAT. Sec. 105.500(3) (Supp. 1967). The Massachusetts state employee program directs that units be based on "community of interest" among employees which may include similar working conditions, common supervision, and physical location. Like the Missouri provision, it seems that the use of the term "community of interest" carried no special connotation. MASS. ANN. LAWS, Sec. 149:178(F)(3) (Supp. 1967).

21. Of those special teacher statutes that have not disposed of the unit issue by providing for proportional representation, supra n. 16, the Nebraska, Oregon, and Washington schemes cover all certificated personnel except the chief administrative officer of the school district. This would seem to provide for the automatic inclusion of supervisors and satellite personnel in bargaining units. There are no standards provided by which those personnel could be excluded if that should prove appropriate. Neb. Laws, Ch. 518, Sec. 2 (1967); ORE. REV. STAT. Sec. 342.460 (1965); WASH. REV. CODE Sec. 28.72.020 (Supp. 1965). The Rhode Island Teachers Act excludes from its coverage supervisors, assistant supervisors, principals, and assistant principals but does provide that all other certificated teachers can vote in representation elections. R. I. GEN. LAWS, Sec. 28-9.3-2 (Supp. 1966).

22. CONN. GEN. STAT. ANN. Sec. 10-153(b)(b) (1967). It seems only if both a majority of the teachers and special services personnel and/or a majority of the administrative and supervisory personnel petition and vote for a single, all-inclusive negotiating unit can such a unit be established. Further, if either a majority of teachers or a majority of administrative personnel calls for a separate negotiating unit to be set up, such units must be established, and the other group has no alternative but to constitute a separate unit itself if it wishes to negotiate under the law.

23. supra, n. 20.

24. CONN. GEN. STAT. ANN. Sec. 7-471(1)(B) (Supp. 1967); DEL. CODE ANN. tit. 19, Sec. 1305 (Supp. 1966); MASS. ANN. LAWS, Sec. 149:178(F)(4) and Sec.149:178(H)(3) (Supp. 1967); MINN. STAT. ANN. Sec. 179.52(4) (1966); MICH. STAT. ANN. Sec. 17.455(2) (Supp. 1965); MO. ANN. STAT. Sec. 105.500(2) (Supp. 1967); ORE. REV. STAT. Sec. 243.780(2) (1965); R. I. GEN. LAWS Sec. 28-9.4-6 and Sec. 36-11-6 (Supp. 1967); VT. STAT. ANN. tit. 21, Sec. 1703 (Supp. 1967); WISC. STAT. ANN. Sec. 111.70(4)(d) and Sec. 111.83(3) (West Supp. 1967). The Firefighter statutes are silent on the problems of unit determination, and only the Rhode Island and Maine statutes provide for elections. R. I. GEN. LAWS, Sec. 36-11-6 (applying the procedures of the State Labor Relations Board to all the public employee statutes); ME. REV. STAT. tit. 26, Sec. 984 (Supp. 1966).

25. ORE. REV. STAT. Sec. 342.460 (1965); WASH. REV. CODE Sec. 28.72.030 (Supp. 1965); R. I. GEN. LAWS, Secs. 28-9.3-3, 28-9.3-5, 28-9.3-7 (Supp. 1966). The Connecticut statute is vague, but it too seems to require an election whenever an organization desires to represent teachers before school boards. CONN. GEN. STAT. ANN. Sec. 10-153(b)(a) (Supp. 1967).

26. MASS. ANN. LAWS Sec. 149:178H (Supp. 1967) ("other suitable procedures" permissible); N. Y. CIV. SERV. LAW, Sec. 207(2) (McKinney Supp. 1967) (dues deduction authorizations); Wash. Extraordinary Session Laws, Ch. 108, Sec. 6 (1967) (examination of union membership rolls, comparison of signatures on a union's bargaining authorization cards).

27. Supra, n. 17. For Connecticut teachers, elections are conducted by impartial persons selected by the parties and election disputes are supposed to be submitted to boards of arbitration. CONN. GEN. STAT. ANN. Sec. 10-153(b) (b) (Supp. 1967). In practice, however, the persons chosen by the parties usually resolve the disputes. The Minnesota, Nebraska, Oregon, and Washington teachers statutes vest all control over representation procedures in the local school boards. MINN. STAT. ANN. Sec. 125.24 (Supp. 1967); Neb. Laws. Ch. 518, Sec. 4 (1967); ORE. REV. STAT. Sec. 342.460(2) (1965); WASH. REV. CODE Sec. 28.72.080 (Supp. 1967). Although the Taylor Act in New York allows local authorities to administer their own procedures, those procedures must conform to the policy directive of the act. Supra, n. 17. For Massachusetts state employees, the director of personnel in each appointing authority is directed to issue "consent recognition" notices if only one organization seeks recognition, while the services of the State Labor Relations Commission are made available for conducting elections, when two or more organizations seek recognition. MASS. ANN. LAWS. Sec. 149:178F(4) (Supp. 1967). Only a few schemes have provided mechanisms to deal with improper election procedures, infra, n. 44.

28. The following statutes require that a petitioning organization prove that 30 percent or more of the employees in the unit are its members, and that any other organization desiring to be placed on the ballot have 10 percent or more of the unit's employees as members: DEL. CODE ANN. tit. 19, Sec. 1305 (Supp. 1966); MASS. ANN. LAWS, Sec. 149:179(F)(4) (Supp. 1967) (state employees); MICH. STAT. ANN. Sec. 17:455(12)(a) (Supp. 1965); OREGON, CIVIL SERVICE RULE ON COLLECTIVE BARGAINING, Sec. 98-200(5) (1966) (state employees only); Wash. Extraordinary Session Laws, Ch. 108, Sec. 7 (1967); All the Rhode Island procedures require that the petitioning organization have 20 percent or more of the unit employees as members, and that other organizations desiring to be placed on the ballot have 15 percent or more of a unit's employees as members. R. I. GEN. LAWS, Secs. 28-9.1-5, 28-9.2-5, 28-9.3-5, 28-9.4-6, and 36-11-6 (Supp. 1966). The Connecticut Teachers Act also requires that the petitioning organization

have 20 percent of the unit as members, but allows other organizations on the ballot if they have 15 percent of the unit as members. CONN. GEN. STAT. ANN. Sec. 10-153(b)(b) (Supp. 1967).

29. CONN. GEN. STAT. ANN. Sec. 7-471(a) and (B) (Supp. 1967) MICH. STAT. ANN. Sec. 17:455(12)(b) (Supp. 1965); MINN. STAT. ANN. Sec. 179.52(4) (1966); N. Y. CIV. SERV. LAW, Sec. 207(2) (McKinney Supp. 1967); WISC. STAT. ANN. Secs. 111.70(4)(d) and 111.83(5) (West Supp. 1967). Some statutes have given special emphasis to the election procedure in decertification proceedings whereby a special election is held after a petition is presented to determine the sole question of whether the organization currently representing the employees should continue in that capacity. CONN. GEN. STAT. ANN. Sec. 7-471(A)(ii); MICH. STAT. ANN. Sec. 17:455(12)(a) (Supp. 1965); OREGON, CIVIL SERVICE RULE ON COLLECTIVE BARGAINING, Sec. 98-600 (1966); VT. STAT. ANN. tit. 21, Sec. 1703 (Supp. 1967); MASS. ANN. LAWS Sec. 149:178H(2) (Supp. 1967).

30. See, for instance, Cook County Commissioners' Fact Finding Board Report on Collective Bargaining and County Public Aid Employees, 20 IND. & LAB. REL. REV. 459, 468 (1967).

31. CAL. GOV'T CODE ANN. Sec. 3502 (West Supp. 1967).

32. CAL. EDUC. CODE ANN. Sec. 13085 (West Supp. 1967); MINN. STAT. ANN. Sec. 125.22(3) (Supp. 1967). This same result is probably achieved by the Oregon Teachers Act, ORE. REV. STAT. Sec. 342.460 (1965).

33. N. Y. CIV. SERV. LAW, Sec. 207(3)(b) and 205(5)(f)(1) (McKinney Supp. 1967).

34. It will be remembered that this is the effect of the Minnesota general public employee law's provision concerning "formal" and "informal" representation. supra, n. 14.

35. The following statutes have provisions of this sort, usually with the limitation that bargaining cannot occur over statute or civil service rule promulgated conditions: DEL. CODE ANN. tit. 19, Sec. 1301(c) (Supp. 1966); FLA. STAT. ANN. Sec. 839.221 (1965) and Sec. (4 BNA LAB. REL. REP. Sec. 19:225 [1967]). ILL. STAT. ANN. Ch. 24, Sec. 10-3-8 (Smith-Hurd 1962); ME. REV. STAT. tit. 26, Sec. 983 (Supp. 1966); MASS. ANN. LAWS Sec. 149:178F(6), Sec. 149:178I (Supp. 1967); MICH. STAT. ANN. Sec. 17:455(1) (Supp. 1965); ORE. REV. STAT. 243.710, Sec. 342.450 (1965); R. I. GEN. LAWS, Sec. 28-9.1-4, Sec. 28-9.2-4, Sec. 28-9.3-2, Sec. 28-9.4-3, 36-11-1(c) (Supp. 1966); N. Y. CIV. SERV. LAW, Sec. 201(5) (McKinney Supp. 1967) (presumably this will be one of the issues the PERB is to study, Sec. 205(5)(f); WISC. STAT. ANN. Sec. 111.70(2) (West Supp. 1967) (and Sec. 111.90 contains language

attempting to define "management rights," which gives state authorities power to manage and to impose disciplinary penalties).

36. The California Teachers Act provides for "meeting and conferring" (not good faith negotiations) on matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, and other matters relating to the definition of education objectives, determination of the content of courses and curricula, selection of textbooks, and other aspects of the instructional program to the extent that such matters are within the discretion of the public school employer under the law. CAL. EDUC. CODE ANN. Sec. 13085 (West Supp. 1966). The Minnesota Teachers Act mandates that there be bargaining on all economic matters but specifically excludes educational policy issues from the scope of bargainable issues, directing only that the parties meet and confer with an object of giving everyone an opportunity to be heard. MINN. STAT. ANN., Secs. 125.20(5), 125.23 (Supp. 1967). The Washington Teachers Act provides for negotiation relating to curricula, text selection, in-service training, student teaching, personnel hiring and assignment, leaves of absence, salaries, and non-instructional duties. WASH. REV. CODE Sec. 28.72.030 (Supp. 1965). Some of the other general public employee acts have not adopted the typical private sector definition. The California Act provides that the parties can "confer" on all matters relating to employment. CAL. GOV'T CODE ANN. Sec. 3505 (West Supp. 1967). The Washington statute specifies that bargaining can take place on any matter except those issues delegated to the civil service commission. Wash. Extraordinary Session Laws, Ch. 108, Sec. 10 (1967). The Wisconsin State Employees Act has provided that bargaining can consider grievance procedures, seniority rights, work schedules, vacation schedules, sick leave utilization, application and interpretation of established work rules, health and safety practices, interdepartmental transfers, and other matters; but the employer does not have to bargain in relation to statutory and rule provided prerogatives of promotion, layoff position classification, compensation, fringe benefits, discipline, merit salary determinations, and other areas firmly established by civil service law. WISC. STAT. ANN. Sec. 111.91 (West. Supp. 1967).

37. N. Y. CIV. SERV. LAW, Sec. 208(c) (McKinney Supp. 1967) provides for unchallenged representation until the next budget submission date and for twelve months after that, or for periods up to 24 months after the budget submission date if the parties agree.

38. MASS. ANN. LAWS Sec. 149:178I (Supp. 1967). The parties are required to bargain at time related to the budget making process, and elections are barred during the term of any contract, which presumably would extend from one budget submission date to the next.

39. These schemes prohibit elections during the term of any contract: MICH. STAT. ANN. Sec. 17:455(14) (Supp. 1965) (unless it has been three years since bargaining took place; then an election can be held at any time); CONN. GEN. STAT. ANN. Sec. 7-471(1)(B) and Sec. 7-476 (Supp. 1967) (provision similar to Michigan's on the three year maximum); Wash. Extraordinary Session Laws, C. 108, Sec. 7 (1967). The Rhode Island Teachers Act requires that elections shall not be held more often than once each 12 months and no later than 30 days prior to the expiration of any contract. R. I. GEN. LAWS, Sec. 28-9.3-7 (Supp. 1966). Similarly, the Connecticut Teachers Act provides that no more than one election be held each year. CONN. GEN. STAT. ANN. Sec. 10-153(b)(b) (Supp. 1967). Every scheme with an election procedure has prohibited elections for one year after an election is held.

40. R. I. GEN. LAWS, Secs. 28-9.1-13, 28-9.2-13, 28-9.3-13, 28-9.4-9 (Supp. 1967). An identical provision appears in the Florida Firefighter Law, FLA. STAT. ANN., Secs. ____ (4 BNA LAB. REL. REP. Sec. 19:225 [1967]), and in the Wyoming firefighters Law, WYO. STAT. ANN. Sec. 27-273 (1965).

41. CONN. GEN. STAT. ANN. Sec. 7-473(a) (Supp. 1967); MASS. ANN. LAWS Sec. 149:178I, 149:178J (Supp. 1967) (municipal employees); N. Y. CIV. SERV. LAW, Sec. 209(1) (McKinney Supp. 1967); MINN. STAT. ANN. Sec. 125.25 (Supp. 1967).

42. The Taylor Law, it will be remembered, has attempted to deal with this problem by setting up bargaining units in such a way that the public employer will have the necessary authority. N. Y. CIV. SERV. LAW, Sec. 207(1)(b) (McKinney Supp. 1967); For municipal employees in Connecticut, a request for funds necessary to implement agreements, for the approval of provisions of an agreement in conflict with any rule or charter adopted by a public employer or personnel board, for provisions changing statutes regulating the hours of work of policemen or firemen, for changes in the retirement system shall be submitted to the municipal governing body within 14 days of the date on which agreement was reached. These requests will be approved automatically if the legislative body fails to act within 30 days of the end of the 14 day period. If the legislative body does not approve the request, the matter must immediately be returned to the bargaining table. If the request is approved, then the budget making authority is directed to provide the necessary funds notwithstanding any provision to the contrary in other ordinances or statutes. Collective bargaining agreements approved in this fashion shall prevail if in conflict with other statutes. Furthermore, if the municipal employer is an authority which by law has the power to determine wages, hours, and working conditions it shall have the power to enter into collective bargaining agreements without securing the approval of the legislative body. CONN. GEN. STAT. ANN. Secs. 7-471(b), (c), (d), (e), (f) (Supp. 1967). In Minne-

sota and Missouri, the employer bargaining representatives are to prepare the necessary ordinances and statutes for implementing settlements and submit them to the legislative bodies. MINN. STAT. ANN. Sec. 179.522 (1966), MO. ANN. STAT. Sec. 105.520 (Supp. 1967). For Wisconsin state employees a special division of employment relations in the state government was created to represent the state along with the particular agency involved. Bargaining results cannot be effective until approved by this division. WISC. STAT. ANN. Sec. 111.80(4), 111.89 (West Supp. 1967).

43. MASS. ANN. LAWS Sec. 71:34, Sec. 149:178I (Supp. 1967).

44. The following statutes provide for unfair labor practice procedures like those found in the private sector: CONN. GEN. STAT. ANN. Secs. 7-470, 7-471 (Supp. 1967); MASS. ANN. LAWS Sec. 149:178F(10) and 149:178L (Supp. 1967); MICH. STAT. ANN. Sec. 17:455(10), (16) (1965); R. I. GEN. LAWS, Secs. 28-9.3-6, 28-9.4-7, 36-11-6 by reference to the state labor relations act Sec. 28-7 (Supp. 1966); VT. STAT. ANN. tit. 21, Sec. 1703 by reference to the state labor relations act (Supp. 1967); WISC. STAT. ANN. Secs. 111.70(3), 111.84 (West Supp. 1967).

45. Supra, n. 12-14.

46. The statutes doing just that are cited supra, n. 44. In addition to the general power to issue cease and desist orders and the right to have them enforced, most of the schemes permit the administering authority to order the reinstatement of an employee with back pay if the employer has committed an unfair labor practice such as a discriminatory discharge. The Connecticut and Massachusetts procedures, supra, n. 44, permit the authority to order a withdrawal of certification of recognition status if an employee organization commits an unfair labor practice.

47. In those schemes that have adopted them, the number and type of unfair labor practices vary widely. The Michigan and Rhode Island schemes provide for employer unfair labor practices only, while the rest also prohibit unfair actions by employee organizations, supra, n. 44. The employer unfair practices center on prohibiting domination and interference with formation of employee organizations and representation elections, prohibiting discriminatory discharges because an employee exercised his rights created under the law, and prohibiting refusals to bargain and discuss grievances. The employee organization unfair practices prohibit those organizations from coercing the public employer in choosing his representative, prohibit refusals to bargain in good faith, and prohibit interference with employees exercising their rights under the act. The Wisconsin procedure for state employees is interesting in that it provides for employee organization unfair labor practices if a union refuses to arbitrate when it has previously agreed to do so and if the union forces

supervisors to become union members. WISC. STAT. ANN. Sec. 111.84 (West Supp. 1967). The Massachusetts and Wisconsin state employee programs are unique in providing that it shall be an unfair labor practice for an employee organization to strike. MASS. ANN. LAWS Sec. 149:178F(9) (Supp. 1967); WISC. STAT. ANN. Sec. 111.84 (West Supp. 1967).

48. N. Y. CIV. SERV. LAW, Sec. 205(5)(k) (McKinney Supp. 1967).

49. Of the 29 statutory provisions that prohibit the right to strike, 18 do not provide for sanctions: ALA. CODE Sec.____(4 BNA LAB. REL. REP. Sec. 10:202 [1967]); CONN. GEN. STAT. ANN. Sec. 7-475 (Supp. 1967); DEL. CODE ANN. tit. 19, Sec. 1313 (Supp. 1966); FLA. STAT. ANN. Sec.______ (4 BNA LAB. REL. REP., Sec. 19:225 [1967]); MASS. ANN. LAWS Sec. 149:178F(10) and 149:178M (Supp. 1967); MO. ANN. STAT. Sec. 105:530 (Supp. 1967); ME. REV. STAT. tit. 26, Sec. 911 (Supp. 1966); ORE. REV. STAT. Secs. 243:760 (1965); CONN. GEN. STAT. ANN. Sec. 10-153e (Supp. 1967); R. I. GEN. LAWS Secs. 28-9.1-2, 28-9.2-12, 28-9.3-1, 28-9.4-16, 36-11-6 (Supp. 1966); VT. STAT. ANN. tit. 21, Sec. 1704 (Supp. 1967); Wash. Extraordinary Session Laws, Ch. 108, Sec. 13 (1967), WISC. STAT. ANN. Sec. 111.70(4)(d) (West Supp. 1967), NEB. REV. STAT. Sec. 48-801 - 48-823 (1967).

50. MICH. STAT. ANN. Sec. 17:445(6) (Supp. 1965); N. Y. CIV. SERV. LAW, Sec. 210(2), (McKinney Supp. 1967). WISC. STAT. ANN. Sec. 111.81(14)(a) (West Supp. 1967).

51. HAWAII REV. LAWS, Sec. 5-7 - 5-12 (1957); MICH. STAT. ANN. Sec. 17:455(6) (Supp. 1965); MINN. STAT. ANN. Sec. 179.54(1966); OHIO REV. CODE Sec. 4117.01-4117.05 (1966); PA. STAT. ANN. tit. 43, Sec. 215.1 - 215.5 (Purdon 1964); VA. CODE, Sec. 40.65 - 40.67 (1953); WISC. STAT. ANN. Sec. 111.81(14)(a) (West Supp. 1967).

52. HAWAII REV. LAWS, Sec. 5-7 - 5-12 (1957); N. Y. JUDICIARY LAW, Sec. 751(1). (McKinney Supp. 1967); WISC. STAT. ANN. Sec. 111.81(14)(c) (West Supp. 1967).

53. MINN. STAT. ANN. Sec. 179.55(a)-(b) (1966); OHIO REV. CODE, Sec. 4117.01 - 4117.05 (1966); PA. STAT. ANN. tit. 43, Sec. 215.1 - 215.5 (Purdon 1964).

54. MINN. STAT. ANN. Sec. 179.55(c) (1966); N. Y. CIV. SERV. LAW, Sec. 210(2) (McKinney Supp. 1967); WISC. STAT. ANN. Sec. 111.81 (14)(b) (West Supp. 1967); VA. CODE Sec. 40.65 - 40.67 (1953).

55. S. Rosenzweig, The Condon-Wadlin Act Re-examined. 9 IND. & LAB. REL. RESEARCH 3 (1965).

56. NEW YORK, GOVERNOR'S COMMITTEE ON PUBLIC EMPLOYEE RELATIONS REPORT, 56 (1966).

57. N. Y. CIV. SERV. LAW, Sec. 201(3)(b) (McKinney Supp. 1967).

58. N. Y. CIV. SERV. LAW, Sec. 210(3)(a) (McKinney Supp. 1967). The courts may also revoke checkoff rights in imposing penalties for contempt of court injunctions if the PERB has not already done so. N. Y. JUDICIARY LAW, Sec. 751(2)(b). The chief legal officer of the government unit confronted with a strike is required to notify the PERB if a strike occurs, and either that officer by motion, or the PERB on its own motion, can institute proceedings. Guidelines are established in the law for the determination of whether the employee organization did violate the no-strike provision. These include findings as to whether the organization called the strike or tried to prevent it; whether the organization made good faith efforts to terminate the strike; and whether the public employer engaged in such acts of extreme provocation as to detract from the responsibility of the employee organization. N. Y. CIV. SERV. LAW, Sec. 210 (McKinney Supp. 1967).

59. The penalty imposed on employee organizations which violate the no-strike policy is to be either $10,000 or 1/52 part of the total yearly dues levied on the union membership for each day of unlawful activity, whichever sum is lesser. An individual may be fined a maximum of $250 and/or imprisoned for a period not to exceed thirty days. N. Y. JUDICIARY LAW, Sec. 751 (McKinney Supp. 1967). If a striking individual is not judged guilty of contempt of court for violating an injunction against a strike, he may still be subjected to discipline and possible civil service probation, supra, notes 50, 54. The court, in setting the fines, is directed to consider the extent of wilfull defiance of the previous court order restraining the unlawful activity, the impact of the strike on the public health, the ability of the employee organization to pay the fine, the refusal on the part of either party to submit the dispute causing the strike to the statutory impasse procedures, and the contribution of the public employer to the strike by engaging in acts of extreme provocation. The penalties are imposed only if the individuals or the union violate injunctions previously issued against strike activity. N. Y. CIV. SERV. LAW, Sec. 212 (McKinney Supp. 1967). N. Y. JUDICIARY LAW, Sec. 751(2) (McKinney Supp. 1967).

60. N. Y. CIV. SERV. LAW, Sec. 211 (McKinney Supp. 1967). The chief legal officer of an affected governmental unit is required to institute proceedings in court for an injunction if a strike of public employees merely appears imminent. This provision is an obvious attempt to negate the tendency among public employers not to invoke the penalties or to agree to disregard them as part of the price of a settlement.

61. MASS. ANN. LAWS Sec. 149:178(F)(9) (Supp. 1967).

62. WISC. STAT. ANN. Sec. 111.84 (West Supp. 1967).

63. CONN. GEN. STAT. ANN. Sec. 7-472(a) (Supp. 1967); MASS. ANN. LAWS Sec. 149:178K (Supp. 1967); MASS. ANN. LAWS Sec. 30:53 - 30:57 (1965); MICH. STAT. ANN. Sec. 17:455(7) (Supp. 1965); N. Y. GEN. MUN. LAW, Secs. 682.4, 683.1, 684.7, 684.9 (McKinney 1963); Executive Order Relating to Procedures for the Submission and Settlement of Grievances of State Employees, Public Papers of Gov. Harriman, 679 (1955); N. D. CENT. CODE, Sec. 34-11-01 - 34-11-05 (1960); PA. STAT. ANN. Sec. 215.1 - 215.5 (Purdon 1964).

64. The Connecticut, Massachusetts municipal, Michigan, North Dakota, and Pennsylvania schemes have done this, id., n. 63.

65. The New York procedure for local government employees, N. Y. GEN. MUN. LAW, Secs. 682.4, 683.1, 685.7, 684.9 (McKinney 1963), sets up a three stage grievance procedure. The first step is a review of the matter with the immediate supervisor; the second is an appeal to the agency head; and the third step requires a board appointed by the chief executive officer of the governmental unit to make recommendations on appeals from the second step. Governments of less than one hundred employees are permitted, but not required, to establish this procedure. The Massachusetts procedure for state employees, MASS. ANN. LAWS, Sec. 30:53 - 30:57 (1965) also specifies a three stage procedure. The first stage consists of a written complaint presented to the appointing authority; the second stage consists of an appeal to the Director of Personnel and Standardization; and the third consists of an appeal from the Director's determination to a Personnel Board of Appeals made up of three members. Unless appealed, all decisions of the Director are final and binding on the parties, and in any case, the decision of the Personnel Board of Appeal will be final and binding.

66. All the Rhode Island schemes, except the program for state employees and policemen, have adopted this formula, R. I. GEN. LAWS, Secs. 28-9.1-7 - 28-9.1-11, 28-9.3-9 - 28-9.3-12, 28-9.4-10 - 28-9.4-14 (Supp. 1967). (For policemen, Sec. 28-9.2-9, there is compulsory arbitration on all issues; For state employees, only mediation is available, Sec. 36-11-6.) The Florida firefighter law has duplicated R. I. Firefighter Law provisions FLA. STAT. ANN. Sec. ____ (4 LAB. REL. REP. Sec. 19:225 [1967]). The end result of such a formula is that for all issues involving the expenditure of money there will be advisory arbitration, or, by its other name, fact finding with recommendations. These schemes all provide for the creation of tripartite panels which are directed to hold hearings and issue their awards or recommendations, as the case may be, within a certain period. In making wage

determinations, the panels are directed to study the wages of workers with comparable skills in governmental units of similar size and to take account of the peculiarities of the employment including any physical hazards or special mental qualifications needed. The costs of this procedure are shared, making it look very much like the fact finding procedures discussed infra. The Maine Firefighter Law, ME. REV. STAT. tit. 26, Secs. 986, 987, 989, 990 (Supp. 1966), requires the appointment of tripartite panels which are directed to consider the same variables as specified in the Rhode Island formula. The recommendations, though, are not binding on either party.

67. WYO. STAT. ANN. Sec. 27-269 - 27-271 (1965). This also requires tripartite panels, but gives no elaborate directions on what factors the panel is to weigh in reaching a decision.

68. CONN. GEN. STAT. ANN. Sec. 7-472(b) (Supp. 1967); DEL. CODE ANN. tit. 19, Sec. 1310 (Supp. 1966); N. Y. CIV. SERV. LAW, Sec. 208(2) (McKinney Supp. 1967); WISC. STAT. ANN. Sec. 111.86 (West 1967).

69. CONN. GEN. STAT. ANN. Secs. 7-472(a), 10-153(f)(a) (Supp. 1967); DEL. CODE ANN. tit. 19, Sec. 1310 (Supp. 1966); MASS. ANN. LAWS, Sec. 149: 178J (Supp. 1967); MINN. STAT. ANN., Sec. 179.54 (1966); MICH. STAT. ANN. Sec. 17:455(7) (Supp. 1965); MO. ANN. STAT. Sec. 105.530 (Supp. 1967); ORE. REV. STAT. Sec. 243.750(1965); R. I. GEN. LAWS, Sec. 28-9.3-9, 28-9.4-10, 36-11-6 (Supp. 1966); Washington Extraordinary Session Laws, Ch. 108, Sec. 10 (1967); WISC. STAT. ANN. Sec. 111.70(4), 111.81 (1), 111.87 (West Supp. 1967). Except for the Connecticut and Wisconsin Municipal Employee laws, all these procedures extend mediation upon the request of one party to the dispute. The Connecticut and Wisconsin programs require that both parties request mediation.

70. For prospects with regard to school district impasses, see, generally, Volume III of this study.

71. CONN. GEN. STAT. ANN. Sec. 10-153(f)(a) (1967) (the secretary of the state board of education is empowered to mediate disputes between teachers and school boards and recommend settlements; only after his intervention has failed is tripartite fact finding available); MICH. STAT. ANN. Sec. 17:455(7) (Supp. 1965) by reference to Sec. 17:454(11) (there seem to be two types of fact finding available in Michigan: the tripartite panel which operates after the failure of mediation; and the labor mediation board may act as a fact finder without the power to make recommendations); MINN. STAT. ANN. Secs. 179.57 (1966) and 125.25 (Supp. 1967); ORE. REV. STAT. Sec. 342.470 (1965); R. I. GEN. LAWS Secs. 28-9.1-9-10, 28-9.3-8-12, 28-9.4-9-13 (Supp. 1966) (advisory arbitration on all issues not involving the expenditure of money, supra, n. 66, and the parties can agree on a different method of selecting the

fact finders). ALA. CODE, tit. --, Sec. -- (4 LAB. REL. REP. Sec. 10: 202 [1967]). FLA. STAT. ANN., Sec. -- (4 LAB. REL. REP. Sec. 19:225 [1967]). IOWA CODE ANN. Sec. 90.27 (Supp. 1966); ILL. STAT. ANN. Ch. 24, Sec. 10-3-8 - 10-3-12 (Smith-Hurd 1962) (procedure demands that the panel consist of five members, four of which are appointed by the corporate authorities, two of those four being recommended by the employee organization involved; the four so chosen choose the fifth). NEB. LAW, Ch. 518, Sec. 7 (1967).

72. CONN. GEN. STAT. ANN. Sec. 7-473 (Supp. 1967); MASS. ANN. LAWS, Sec. 149:178(F)(7) and Sec. 149:178J (Supp. 1967). A panel of three qualified, disinterested persons is submitted to the parties by the state labor relations board in Connecticut and the labor relations commissioner in Massachusetts from which one fact finder is chosen.

73. N. D. CENT. CODE. Sec. 34-11-02 (1960). (the chief executive officer of the government unit involved upon petition by either party appoints two members of the panel, and those two then appoint the third; the statute directs the executive officer to appoint panel members that will represent the interests of each party); N. Y. CIV. SERV. LAW, Sec. 209 (McKinney Supp. 1967) (the PERB appoints the panel after the failure of mediation); WISC. STAT. ANN. Secs. 111.70(e)-111.70(g) and 111.88 (West Supp. 1966) (one fact finder or a panel of three is to be appointed by the WERB depending on the requests of the parties); WASH. REV. CODE Sec. 28.72.060 (Supp. 1965) (either the school board or the teachers' organization may request assistance and advice from a committee of educators and school directors appointed by the state superintendent of public instruction).

74. *Supra*, n. 41.

75. This is the case in New York, *supra*, n. 73.

76. The Rhode Island schemes give elaborate directions, *supra*. n. 66. The Florida and Alabama firefighter laws have similar directions, *supra*, n. 66. Fact finders in Minnesota under the general public employee law are to make recommendations that consider tax limitations imposed by law on government agencies together with wages, hours, and other conditions of employment of other public employees performing comparable work and of private employees doing comparable work. They are also to take into account the internal consistency of treatment of employees in the several civil service categories within the government agency. MINN. STAT. ANN. Secs. 179.57(3), 179.57 (4) (1966).

77. See, Belasco, *Resolving Disputes over Contract Terms in the State Public Service*: An Analysis, 16 LAB. L. J. 533, 541 (1965).

78. The Connecticut and Massachusetts municipal employee programs provide for imposing the cost of the entire procedure on a party in bad faith, supra, n. 72. The Illinois firefighter law requires that the municipality bear the entire cost of the procedure, supra, n. 71. The Minnesota general law requires the government unit to compensate the panel members appointed by the parties, with each side sharing the cost of the third member, supra, n. 71.

79. N. Y. CIV. SERV. LAW, Sec. 209(3) (McKinney Supp. 1967). It must be remembered that the Taylor Law encourages the parties to establish their own impasse resolving procedures. The fact finding mechanism specified in the act only operates if the parties fail to adopt their own procedure, or if their procedures fail to conform to the policy of the act, supra, n. 17. The Wisconsin Municipal Public Employee law has a similar provision concerning impasse procedures. WISC. STAT. ANN. Sec. 111:70(4)(m) (West 1967).

80. See discussion, supra, notes 17 and 27 regarding extension of the power of state labor relations boards over unit determinations and representation elections. See discussion, supra, note 46, regarding extension of the power of state labor relations boards over unfair labor practices. See discussion, supra, note 69, regarding extension of the power of state mediation boards.

81. McKelvey, The Role of State Agencies in Public Employee Labor Relations, 20 IND. & LAB. REL. REV. 179-197 (1967).

82. N. Y. CIV. SERV. LAW, Sec. 205 (McKinney Supp. 1967).